S. HRG. 100-342

PRODUCT LIABILITY REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

PRODUCT LIABILITY REFORM

SEPTEMBER 18, 1987

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE

79-114 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

5261-15

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ERNEST F. HOLLINGS, South Carolina, *Chairman*

DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
DONALD W. RIEGLE, JR., Michigan
J. JAMES EXON, Nebraska
ALBERT GORE, JR., Tennessee
JOHN D. ROCKEFELLER IV, West Virginia
LLOYD BENTSEN, Texas
JOHN F. KERRY, Massachusetts
JOHN B. BREAUX, Louisiana
BROCK ADAMS, Washington

JOHN C. DANFORTH, Missouri
BOB PACKWOOD, Oregon
NANCY LANDON KASSEBAUM, Kansas
LARRY PRESSLER, South Dakota
TED STEVENS, Alaska
ROBERT W. KASTEN, JR., Wisconsin
PAUL S. TRIBLE, JR., Virginia
PETE WILSON, California
JOHN MCCAIN, Arizona

RALPH B. EVERETT, *Chief Counsel and Staff Director*
W. ALLEN MOORE, *Minority Chief of Staff*

SUBCOMMITTEE ON THE CONSUMER

ALBERT GORE, JR., Tennessee, *Chairman*

WENDELL H. FORD, Kentucky
JOHN B. BREAUX, Louisiana

JOHN MCCAIN, Arizona
ROBERT W. KASTEN, JR., Wisconsin

CONTENTS

	Page
Opening statement by Senator Gore	1
Opening statement by Senator Danforth	1
Opening statement by Senator Kasten	3
Opening statement by the Chairman	4
Opening statement by Senator McCain	6
Opening statement by Senator Wilson	15
Opening statement by Senator Pressler	38

CHRONOLOGICAL LIST OF WITNESSES

Carrico, Hon. Harry L., Chief Justice, Supreme Court of Virginia, on behalf of the Conference of Chief Justices	27
Prepared statement	29
Donley, John P., Colorado State Senator	49
Prepared statement	50
Dreier, Hon. William A., Judge, Superior Court of New Jersey, Appellate Division	46
Prepared statement	47
Frey, Robert G., member, State of Kansas Senate, on behalf of the National Conference of State Legislatures	31
Prepared statement	32
Kimmelman, Gene, legislative director, Consumer Federation of America	53
Prepared statement	55
McConnell, Hon. Mitch, U.S. Senator from Kentucky	7
Prepared statement	13
Reynolds, Jonathan, counsel, Cosco, Inc	56
Prepared statement	57
Schwartz, Victor E., counsel, Product Liability Alliance	62
Prepared statement	63
Shapo, Marshall S., professor, Northwestern University School of Law	60
Prepared statement	60
Smart, Hon. Bruce, Acting Secretary, Department of Commerce	16
Prepared statement	25

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Chalfie, Deborah, legislative director, HALT—An Organization of Americans for Legal Reform, statement	69
Eginton, Warren W., U.S. District Judge, District of Connecticut, statement	69
Geltman, Richard B., director, Committee on Economic Development and Technological Innovation, National Governors' Assn., statement	71
National Federation of Independent Business, statement	73
Paull, John J., president, Eagle Manufacturing Co., letter	78
Ross, Lynne, deputy director and legislative director, National Association of Attorneys General, letter	77

PRODUCT LIABILITY REFORM

FRIDAY, SEPTEMBER 18, 1987

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room SR-253, Russell Senate Office Building, Hon. Albert Gore, Jr. (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Kevin Curtin, staff counsel; and Chuck Harwood, minority staff counsel.

OPENING STATEMENT BY SENATOR GORE

Senator GORE. Ladies and gentlemen, the hearing will come to order. I would like to welcome all of our witnesses and guests this morning.

Today the Consumer Subcommittee is holding a hearing on the issue of product liability and various suggestions that Federal action in this area is necessary and feasible.

Although the subcommittee has held hearings in the past on this topic, of course the issue continues to generate considerable controversy, to say the least.

I am firmly of the opinion that our primary objective in this area must be to assure justice, fairness, and adequate compensation to those injured by defective products and to have a system that works.

In addition, I think we must keep in mind the vital safety incentives that the court system brings to the marketplace. This morning we will be receiving testimony from Senator McConnell, the administration, representatives of state governments, consumers, manufacturers, and the academia.

Before we begin with these witnesses, I wonder if any of my colleagues have a statement to make at this point. And I will call first on the distinguished ranking Member of the committee, Senator Danforth.

OPENING STATEMENT BY SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much. I want to express my appreciation to you for being willing to chair this hearing and to raise again for our consideration in the Commerce Committee the issue of product liability.

And in specific terms, that of course is the handle that we in this committee have on a broader subject, which is the general area of

tort reform. Last Congress, the 99th Congress, the issue of product liability really was one of the main thrusts of the Commerce Committee.

And it was a very difficult issue. The bill that was finally reported out of the Committee was reported out by a vote of 10 to 7. I think that it was an issue that engendered more emotion than any other subject that we had before the Commerce Committee last year.

It generated a variety of opinions, both in support of the general concept, and opposed to specific elements of resolving the problem. People of very good will were on both sides of that final vote.

The question of caps on pain and suffering proved to be the most volatile single issue, and I understand that. We were striving last year for some incentive system so that product liability cases could be removed from full-blown litigation and settled early.

The method that we chose clearly was extremely controversial, and I have made it clear all along that I am searching for a solution, and that I am certainly not locked into any specific idea of what that solution should be.

Clearly, it seems to me that the present civil justice system, generally with respect to tort law, but specifically with reference to product liability, is a system that is badly broken.

It has been rightly called a lottery. It is quirky, unpredictable, people who are seriously injured are forced to settlement because they feel that they could be strung out forever and they have bona fide costs that they have to pay, and sometimes they settle for less than they deserve.

On the other hand, sometimes people can file what a lot of objective observers would feel are frivolous lawsuits, keep the lawsuit going forever or threaten to, and end up hitting the jackpot. So it has been rightly called the lottery system.

The White House Conference on Small Business, a year ago, said that liability reform was the number one issue on their agenda. This was the number one thing as far as small business is concerned.

So I am delighted that we are focusing on this again. And I can say that Senator McConnell, who has been so active in this area, and Senator Kasten, who has been the father of the issue as far as I am concerned in the Senate, are both here today, and that the three of us and our staffs have been conducting discussions to see if some of the differences among us can be worked out.

We have had differences of approach among us. One of the differences has to do with the efficacy of the fault-based system.

But my view is that we should attempt to put our specific differences behind us, if possible, and try to come up with some approach in the area of product liability which offers justice and relief for those who are injured.

But relief in a way that is timely and that is fair, that does not take five years to reach, and that does not provide a windfall for the lawyers and a pittance for the litigants. So, Mr. Chairman, again I thank you for chairing this hearing.

I do have also, Mr. Chairman, an opening statement of Senator McCain, and I would ask that it be included in the record.

Senator GORE. Of course. Without objection.

The distinguished former Chairman of this subcommittee, Senator Kasten.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Mr. Chairman, thank you very much. I would like to join Senator Danforth in expressing my pleasure that you have scheduled this hearing today so that we may once again begin the process of addressing what I believe continues to be one of the most important, if not the most important, issue facing our country today, the urgent need for meaningful product liability tort reform.

I am pleased that by working with you and Senator Hollings and others we are focusing on these problems. I must admit, however, that I am a little disappointed that we begin at the question of whether or not there is a problem, and whether or not Federal reform is necessary, because the Senate Commerce Committee has reported bills dealing with this problem in the 97th, the 98th, and the 99th Congress.

I believe that the need for Federal product liability reform has been clearly established. What we must do now is act. And I think that it is important, though, that this Committee is beginning, and I thank and congratulate you for that.

The natural thing for people to ask, I think, today as we begin these hearings is, what has changed? What is different from the 97th or the 98th or the 99th Congress? Particularly, what is different from last year?

And I would like to focus for just a moment on that question. This committee approved, by a 16–1 vote, the majority of the product liability reform proposal reported by the committee last year.

The Senator from Missouri is correct, that we had a difference on caps, on an accelerated settlement procedure, on an alternative settlement procedure. But generally, we had a 16–1 consensus last year on this committee.

That was followed by an 84–13 procedural vote on the floor of the Senate. Eighty-four votes on a procedural vote, but in favor of Federal product liability reform legislation.

These votes, the 16–1 vote and the 84–13 vote, demonstrate there is a strong bipartisan support for change. And that bipartisan support was not there in previous years.

Secondly, I think it is important to recognize that we have been able to split the ranks of the trial lawyers away from the larger group of attorneys represented by the American Bar Association. It is now clear that the American Bar Association recognizes that business as usual is simply no longer acceptable. In effect, what we have done is isolated those trial lawyer groups who have tried to fight the various resolutions.

Now the trial lawyers are even more isolated than ever before in their opposition. And I think that we can focus on that opposition, and I believe that we can be successful.

Next I think we can look at the largest state of our country, which often is a leading state. Clearly California has been a leading state in some of the product liability suits, and some of the product liability theories of law that we have recognized.

But now we have seen that the voters in the State of California, with Proposition 51, have passed overwhelmingly a resolution for a key element of product liability reform, and tort reform, joint and several liability. The voters of the largest state in the Nation, often trend-setting voters, recognize that there is a problem and have passed the solution.

If anyone has had questions about whether the American public recognizes the scope of this crisis, a relatively recent Harris poll points out that 71 percent of the people think the current system is out of control because of laws which make it too easy to sue. And 65 percent of the American people with this Harris survey say they favor laws to reform the present system. Another boost for us, and Jack referred to it, is the fact that the White House Conference on Small Business named liability reform as the number one problem facing small business.

I think that is important as we look to put together a group of people who are going to be a coalition, a bipartisan and a bicameral coalition, that is going to be working for product liability reform this year.

And lastly, I think important changes have occurred in the atmosphere for reform in the House of Representatives over the past year. We have significantly improved our support, a dramatic turnaround for us, with the Chairman of the Energy and Commerce Committee, a number of Democratic and Republican Representatives, working together with Bill Richardson of New Mexico on his legislation. We see subcommittee activity, we see hearings, and we see a growing consensus in the other body as well as here. All of those changes are significant.

All of those changes are significant. All of those changes are recent. All of those changes are newsworthy. And all of those changes, I believe, make it clear that this issue is developing the consensus that is necessary in order to this year pass product liability tort reform legislation.

So Mr. Chairman, I look forward to working together with you and with other Members of the committee for meaningful product liability reform.

Senator GORE. Senator Hollings, do you have a statement?

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Today, the Consumer Subcommittee is considering an issue that, like a bad penny, continues to turn up over and over again.

As my colleagues know, I have consistently opposed efforts to establish a Federal system of product liability law. I have heard justification after justification for this system, but have yet to hear one that makes any sense.

In the first place, I have serious concerns about what a Federal system would do to the responsibilities and rights of the States. It seems somewhat ironic that, just yesterday, we officially celebrated the Bicentennial of our Nation's Constitution, and today we are here talking about proposals that would intrude on the very separation between the Federal Government and the States that is such an important element of that document. I will be interested to hear

what some of the State representatives have to say about this issue here this morning.

Another reason cited by advocates of a Federal law is the need for uniformity in the law. "Let's have a Federal standard, then everybody will know what we're dealing with," they say. That's nonsense. If a Federal law is enacted, we'll have a new product liability law together with the current system—and how will they relate to each other? If that doesn't provide a field day for litigation, I don't know what will. A whole new process of interpreting this Federal law will begin, and each State might interpret it somewhat differently, not to mention Federal courts. Where is the uniformity in that?

Then we hear there's a litigation crisis, an explosion in the number of lawsuits filed in the State courts. The evidence I've seen doesn't demonstrate that. The National Center for State Courts last year released a study showing that the increase in tort litigation was about the same as the increase in population. A study made in my own State of South Carolina just last year shows that product liability verdicts account for a small percent of all civil jury verdicts. So I have yet to be convinced that we're facing a lawsuit crisis situation.

The original force behind the movement for a Federal product liability law was the liability insurance crisis in the 1970s.

By 1983, the product liability insurance crisis had disappeared. In the past few years, there again has been a problem with the cost and availability of insurance, so now we're back to hearing about a Federal product liability law as the solution. But the tort system wasn't responsible for those crises. Instead, these difficulties were largely linked to the cycles in the insurance industry, and the industry's cash flow underwriting policies. In any case, the General Accounting Office testified last year before this subcommittee that the cycle has turned again and the industry is now moving in a positive direction. That testimony was confirmed by a July 1987 GAO report on profitability of the property/casualty insurance industry which found that the industry had about $81 billion in after-tax income between 1976 and 1985.

This year, the argument that's being made is that product liability costs make us less competitive. With the trade bill, competition is the catchy word. However, the facts don't show that product liability concerns threaten our ability to compete. The Rand Corporation in 1983 concluded that product liability costs for most large manufacturing firms amount to much less than 1 percent of total sales revenue. A report of the Conference Board—which is a business information group advising businesses around the world—made available just this year found that product liability issues have hardly affected economic concerns for large firms, because liability lawsuits are overwhelmingly settled out of court, and usually for sums that corporations consider modest. This evidence refutes the argument that American business is less competitive because of product liability issues.

In addition, Senator Gore, I was glad to hear you mention that we must not eliminate incentives for manufacturers to produce safer products. Our tort law system has provided these incentives through such doctrines as strict liability, and so we have a safer

society. For example, product liability lawsuits can be credited with the elimination of cancer-causing asbestos as a common building material. It seems to me that the opportunity to compete on the free market brings with it a responsibility to produce products that are not unreasonably dangerous, and to make reparation for any harm caused when that duty is neglected. I wonder whether eliminating these incentives to safety may make our products even less competitive on the market—who will want to purchase a product that has not been designed or manufactured with strong safety considerations in mind, considerations that our tort system has provided over the years?

Mr. Chairman, I look forward to listening to our witnesses here this morning, because so far I don't think the case has been made for a Federal law in this area.

Senator GORE. Thank you very much.

[The statement referred to earlier follows:]

OPENING STATEMENT BY SENATOR MCCAIN

Thank you, Mr. Chairman. Products Liability Reform is controversial and emotional, involving the balance of two important interests: the efficiency of our economic and legal system, and the rights of our citizens to be compensated for injuries caused by defective products. Mr. Chairman, you and Senator Hollings, Chairman of the Commerce, Science and Trasnsportation Committee, are to be congratulated for your willingness to tackle these issues. The well-being of our citizens, and of our economy, is profoundly affected by the current turmoil in the Products Liability area, a turmoil that I do not believe benefits society at large.

As evidenced by floods of lawsuits, soaring litigation costs, ever increasing damage awards, and sky rocketing insurance rates, we have a Products Liability crisis.

For example, there has been a thousand percent increase in Products Liability cases in Federal courts between 1975 and 1985. Moreover, recent surveys have shown substantial increases in litigation costs in the Products Liability area. In fact, more money is spent now on litigation than is awarded to injured plaintiffs. In the aviation industry, the cost of insurance coverage in 1986 approached $100,000 per airplane. The cost of insurance consumed 18% of the sales costs of ladder manufacturers in 1986. In some cases the cost of liability insurance policies had doubled or tripled.

Mr. Chairman, we must not allow this situation to deprive consumers of new products, or to deprive manufacturers and business people the opportunity to introduce new products to consumers. Even the most successful feel the crunch of the Products Liability crisis. To quote a prominent American businessman, "the first thing you have to be able to do in order to compete is take a risk. If you can't afford to take a risk, then you can't afford to compete. And what we are doing to ourselves in this country right now is making it more and more difficult to take even a small risk." The author of this quote is Lee Iacocca, a man who has benefited many Americans through his willingness to put himself on the line and take the risks.

I believe it is appropriate for Congress to address the matter of Products Liability reform, in its constitutional role as the regulator of interstate commerce. It is Congress' duty to maintain the free flow of commerce between the states. Currently, the laws on products liability are regulated by the states. Thus, a patchwork of statutes and cases has developed, differing from state to state. Because most manufacturers market their products in more than one state, the inherent unpredictability as to which state's law will apply in a Products Liability case has heavily burdened interstate commerce. It is our constitutional duty to lift this burden, and institute predictability in the Products Liability area. In fact, as you know, Mr. Chairman, this committee has engaged in several earlier attempts to promote reforms in the Products Liability area. Senator Kasten deserves credit for his fine efforts towards Products Liability reform.

I think there are four issues we should address during the course of this hearing. First, how can we reallocate liability so that those at fault, rather than those with the deep pockets, are made to compensate the injured consumer? Second, how can we create predictable laws, so that order may be restored to the channels of national commerce? Third, how can we regulate punitive damages so that only those fla-

grantly culpable are made subject to crippling awards? Fourth, how can we reduce the costs of litigation in the Products Liability area, so that deserving plaintiffs, and not plaintiff's lawyers, are the primary beneficiaries of awards made to compensate for harm caused by products?

Mr. Chairman, I am hopeful that we will be able to put the Products Liability system back on track through Federal legislation. By building on our past efforts in this subcommittee, perhaps we can achieve success.

Mr. Chairman.

Senator GORE. We are honored to have as our first witness our colleague, Senator Mitch McConnell, junior Senator from Kentucky, and author of S. 554.

And we are delighted to have you here. I might say to all of our witnesses this morning, because we have a very long list of witnesses, we are going to use the five-minute system.

Of course, with our colleague, we will be a little lenient in its application. But I wanted to explain that at the beginning of the hearing. Your prepared statement in full will be in the record, and please proceed with any or all of it as you see fit.

STATEMENT OF HON. MITCH McCONNELL, U.S. SENATOR FROM KENTUCKY

Senator MCCONNELL. Thank you, Mr. Chairman. I will be happy to accommodate you in terms of time.

I would ask that my full statement be included in the record, and convey my appreciation that you are conducting these hearings on an issue that is of paramount importance to the American people.

As former Chairman of the Subcommittee on Courts of the Judiciary Committee, I too presided over a number of hearings on this general topic. My colleagues, Senator Danforth and Senator Kasten and I, as Senator Danforth indicated, have had numerous discussions about this issue and what we ought to do about it.

Clearly, we have had quite enough hearings, and I say this not to demean the efforts here today. But we have been hearing this issue for years. And, as Senator Danforth and Senator Kasten mentioned, this is a top priority matter.

I would like to add a slight correction in what the White House Conference on Small Business said in August of 1986: it said that tort reform was the number one problem confronting small business in America today.

Product liability, a subset of this problem, was listed seventh. We do have a tendency to include the two together.

But it has been my conviction that what we really needed to do is pass comprehensive tort reform at the Federal level, thereby setting up standards that could be applied to both Federal and state courts throughout this country, that would give us some guidance in handling this kind of litigation.

I know that product liability is the jurisdiction of this committee, and product liability bills have emerged from this committee in the past.

But it seems to me that product liability reform deals with only a small part of the problem, and does not do anything for the boy scouts, the mom-and-pop stores, the little cities, the rural doctors, and all the rest who have an insurance problem related to the litigation system, but do not produce a product.

It is my hope that, at some point in the United States Senate, we will address this issue. You know, there are those who suspect that because 62 of the 100 Members of the United States Senate are lawyers, that is the reason we do not treat this issue.

And I might add that this suspicion is hard to rebut. Is there any other issue that business across America would be crying out for a solution to, is there any other issue that charities across America would be crying out for a solution to, that this highly political body would not respond to?

I can not think of a single one. It is the nature of our job and our work to respond to the concerns of people throughout the land. This has been the number one problem of business in America for a long time. And yet we have not done anything about it. We have hidden under our desks.

There seems to be a kind of institutional problem here, and there are those who suspect that the reason for our inertia is that 62 of 100 Senators are lawyers.

I hope if that is the real reason, that we can overcome it and address the lawsuit problem.

Last year, I advocated what some argued were the most sweeping reforms at the Federal level; the bill that I proposed last year had caps on recovery for pain and suffering, it had punitive damages payable to the court rather than to the plaintiff, limitations on contingency fees, and a variety of other reforms that were widely applauded by business throughout America.

This bill also was widely condemned by lawyers throughout America. Thus, in an effort to come up with a proposal that would be more reasonable, and maybe have a chance of passing. I boiled this lawsuit reform bill down to a few basic principles of fairness and reason, principles which nonetheless must be broadly applied. What I am suggesting, Mr. Chairman, that is an appropriate response to this problem at the Federal level, is a comprehensive tort reform bill imbodying the following four principles.

These are the points that Senator Danforth, Senator Kasten, and I have been discussing over the last few months.

Principle number one: it seems to me, Mr. Chairman, that we have to put fault back in the system. When I was in law school 20 years ago, there was no such thing as no-fault tort.

It was not even contemplated that someone who committed no wrong or no negligent act would end up having to compensate someone who was injured. Clearly we need fault back in the system.

It would not do violence to tort law throughout the 50 states of this Nation if we put fault back in the system, and say to the several states that their courts simply cannot legislate no-fault tort.

Principle number two: we ought to modify the ridiculous concept of joint and several liability that has evolved over the years, to the point where a defendant can be found to be minimally involved in an incident that caused harm, and yet be assessed 100 percent of the damages.

It seems to me at the very least we ought to require a defendant to be 50 percent responsible for the harm before being held accountable for all the damages; for less than 50 percent, the dam-

ages should be fairly apportioned according to the defendant's responsibility.

Principle number three: we need to get serious about curtailing frivolous lawsuits, and I think standards can be constructed to deal with that problem.

The fourth principle, something that Senator Danforth has had a great interest in, is encouraging alternative dispute resolution. We need to do something meaningful about getting these cases outside of the civil court system.

It occurs to me that the following kind of proposal might be reasonable. First, require counsel for all parties to certify to the court, within a reasonable period of time, that their clients have been notified that there are alternative dispute resolution techniques available.

The court should ensure that the parties to a dispute are fully apprised that there is some other way to solve their problem, that might achieve resolution to it while they are still living, and might solve the problem without an enormous fee for the lawyers.

Second, we might consider making certain that the ADR approach, once elected or selected by all of the parties, is binding. Once parties A, B, and C agree to, say, arbitration of this dispute, they ought to sign off on their opportunity to go back through the court system, and drag the whole process out again.

And to ensure that the parties indeed achieve speedy resolution of their problem, we could give them a time limit. We could, for example, require that the ADR forum, once selected, render a final and binding decision within 90 days. Win or lose, it is over in 90 days.

This would save lawyers' fees and a lot of aggravation, and I think this is the kind of thing that would take the pressure off the courts that Senator Danforth is talking about. It has just been an outrage.

Filing lawsuits has become an American pasttime. We would rather file lawsuits than go to a baseball game in this country. One out of 14 Americans this year will be involved in a lawsuit.

So clearly, if we are going to have that kind of crush of litigation, let us give them a chance to solve the problem outside the court system.

Mr. Chairman, I know your list of witnesses is long; thus I will conclude just by suggesting that we ought to take a look at comprehensive lawsuit reform, at the Federal level.

The proposal that I am advocating this year is a good deal more modest than last year. It has no cap on recovery for pain and suffering; no payment of punitive damages to the court.

My proposal simply outlines some reasonable standards that most people think would be appropriate. Some trial lawyers agree to this, by the way, and most people believe this would be an appropriate reform of our litigation system, bringing some sanity to the process by which we resolve our disputes.

Thank you very much, Senator Gore, for the opportunity to be here.

Senator GORE. Thank you very much.

Let me call on Senator Danforth.

Senator DANFORTH. No questions, Mr. Chairman.

Senator GORE. Senator Kasten?

Senator KASTEN. I just want to say to the Senator, thank you for being here, and we look forward to working with you. And I agree with your testimony this morning.

Senator MCCONNELL. As we speak, the discussions continue. I hope you have a good hearing.

Senator GORE. Hold on one second.

The CHAIRMAN. In all candor, you are an experienced attorney. You have been an assistant U.S. attorney and a presiding judge.

And what are you really asking when you talk about comprehensive tort reform at the Federal level? Now we just rang that bell over in Philadelphia yesterday, and we were talking about the Constitution and part of this is, of course, tort law which has been reserved to the several states.

You and I are big states' righters. If there is a problem, and there is, because 43 state legislatures have responded in the last two years on product liability and on other things, joint and several liability, and then various features of punitive damages and what have you. My resistance has been about taking over a segment of tort law. If I took over one I would take over automobile cases.

There is great diversity, all kinds in the 50 states with different highways, different speed limits, different degrees of negligence, comparative negligence. All the defenses that you and I think of, contributory negligence. And they all differ.

We have got that complexity that you have got in product liability. Product liability is no singular thing. Not at all. The doctors, if you want an extreme problem right now, they cannot give medical treatment down in Florida, with malpractice costs there.

If we are going to take over tort liability regarding malpractice, that would be perhaps number two on my list of priorities. Before I got to your third priority of product liability, I just do not see the national government taking over a segment of the states' responsibilities.

That is what nonplusses me. And of course, that is why we have not done it. The states are responding. Kentucky is responding. South Carolina. And the legislatures have handled it, where it is a problem.

And they have moved into the gap, and are doing right well. And I would just hate to see, frankly, a Congressional product liability statute, because the crowd who is sponsoring it thinks Ronald Reagan is going to be in office for life.

That is not going to happen. And you are not going to have this conservative Republican Senate, Congress, or whatever, that you have had when you started introducing this.

You get a liberal Democratic Congress and you trip up over that wire as you leave the floor and go to the next door and then get your money. I never have heard of the Federal system being more conservative or responsible on a score of this kind than the states.

I know as a practicing lawyer, if I could get out of the state court, where they could not think much money at the local level, if I could get into the Federal court that is where I got my better verdicts.

I was a trial lawyer, I angled it that way. And now I am coming up here and having to listen to those presenting evidence or testimony, pleas that would get this thing out of the state courts.

Let us, they say, have a Federal comprehensive tort approach. And there is no basis in fact for it. But let me hear you. Why do you go for the Federal approach?

Senator MCCONNELL. I might just say to my friend from South Carolina, I am sorry, I am going to repeat myself for the other three:

The concept of states' rights over the years, it seems to me, we have employed when we did not want to do anything, and ignored when we did. And so the real issue here is whether this cries out for a Federal solution.

You have articulately stated your view that it does not. My view is that it does. I do not advocate only product liability legislation. The position that I take is even more offensive to my friend from South Carolina than a product liability bill.

I think we ought to have comprehensive lawsuit reform at the Federal level. But I also believe that Federal comprehensive lawsuit reform ought to be confined to very general principles, parameters, if you will, beyond which Federal and state courts could not go in these kinds of cases.

And I have really confined those parameters to four essential points. First of all, I think we ought to make sure we have fault in the system, in both Federal and state courts.

Second, I think we ought to modify the concept of joint and several liability, to the extent that at least one should nave to be found 50 percent responsible for the harm, before you could be assessed 100 percent of the damages.

Third, it seems to me that, at the Federal level, we ought to impose serious disincentives against frivolous lawsuits, or unwarranted delays by defense counsel.

And fourth, I think there ought to be some Federal initiative in the area of alternative dispute resolution that guarantees that lawyers let their clients know about alternative dispute resolution techniques, and that once the parties choose some other method to solve this problem, rather than going through the traditional court system, that they be bound by the result.

So my legislation this year, Senator Hollings, is limited to those rather general principles. It would simply establish reasonable parameters in both Federal and state courts throughout the land.

I do not think that rewrites the substantive tort law of every state in America. It simply sets out some parameters beyond which state courts, and Federal courts, could not go in those kinds of cases.

That is a great modification from what I was advocating last year, which I know was highly offensive to a number of trial lawyers, including caps on recovery for pain and suffering, having punitive damages payable to the court, and limits on continguency fees—especially limits on contingency fees.

All of that I have taken out, and we are just dealing with general principles.

The CHAIRMAN. I spoke to the business school deans, their graduate schools in Washington on yesterday afternoon.

And observed, of course, that the reason, perhaps, that the Japanese have succeeded so well is that they do not have a business school, a graduate school of business.

And I was immediately told, Senator, neither do they have a law school, or just about. Maybe that is what we ought to do. That is what we have on the floor, right while you and I are discussing this topic they are debating suing the President, to bring him into compliance with whether they feel he should comply with the War Powers Resolution.

You talk about being frivolous and how we are going to stop it, we can not even stop the people in the Congress.

Senator MCCONNELL. You are right. And I think there is a great suspicion out in the land that we have too many lawyers.

We have 20 times per capita the number of lawyers they have in Japan. Twenty times per capita, and we certainly do resort to the legal solution to almost every problem.

I mentioned before you came in, that I hope this is not the reason we have not done anything on this issue. But there are a lot of people who suspect that since 62 of the 100 Members of the Senate are lawyers.

That is why we have not done anything about a problem which was listed as the number one problem in America last August 1986. The White House Conference on Small Business said tort reform is the number one problem confronting business in America.

The CHAIRMAN. Well, of course, I would dispute the number one problem of small business in that particular survey.

That is just like asking everybody if they are for taxes. And of course 100 percent of people in America in the survey say, they are against taxes. And that is why you and I are wrecking the economy up here, spending $200 billion more.

You ask a small business, do you like product liability? Oh no, we do not like product liability. That is the way they answer the survey.

I have worked for small business, represented small business and everything else of that kind. Thank heavens for the state system. In fact, I attract industry on the representation.

We do not have runaway juries; the trial judge at that state level can totally eliminate punitive damages. He can say, I do not like that, I do not think they approved it, and eliminate it.

He can take the actual damage and cut it, so you either are going to have a new trial or take what I think they approved. And that is the practice at the state level. We do not have a product liability crisis other than what this crowd created.

Now, they are all dressed up with nowhere to go. And I saw them. We beat labor law reform, and then they came with that other bill, I have forgotten, two Republican Congressmen, and they said that was responsible for inflation.

What was the name of that thing? Oh yes, Davis-Bacon. Well, in any event, after they realized it was not responsible for inflation, it got down to 3 percent. Then they all jumped on product liability.

And now, I can show you a Business Week article where they say, no longer is it a problem.

Senator McCONNELL. Well, we could go on. But I am sure you all would like to hear from some of the other witnesses. I appreciate very much the opportunity to be here. Thank you.

[The statement follows:]

STATEMENT OF HON. MITCH MCCONNELL, U.S. SENATOR FROM KENTUCKY

Good morning. First, let me thank my esteemed colleagues, Senators Gore, Danforth and Kasten, for inviting me to participate in today's hearing on liability reform. As you know, this is an issue to which I have devoted considerable effort and attention.

As we all know too well, Congress tends to work in fits and starts. It jumps on an issue, usually because of a public outcry or crisis, or an alarming press story. Great speeches are given, some bills are introduced, hearings are given, but in the end nothing happens.

Nowhere is this truer than with the issue of this country's liability problems. One year ago, this Nation was in the throes of a devastating liability insurance crisis. As the March 24, 1986 cover of time magazine read, "sorry, America, your insurance has been cancelled." All over this land, day care centers, youth organizations, municipalities, small businesses, baby doctors, and countless other victims were having their insurance policies cancelled, or couldn't pay the price of premiums which increased by 200 percent or 2,000 percent each year.

THE CONTINUING CRISIS IN OUR LIABILITY SYSTEM

This year, all of a sudden, the same newspapers and magazines which urged Congress on to action now are saying that this liability crisis has somehow miraculously disappeared. But this is like arguing that there was no energy crisis one year after the Arab oil embargo in 1973.

Then as now, an ingredient essential to the economy seemed to be on the verge of drying up. But when oil started flowing from other sources, no one believed then that the energy crisis had just gone away. Oil could be purchased, but only at staggering prices. As a result, inflation skyrocketed, millions hit the unemployment lines, and America's standard of living inched downward.

The oil availability crisis subsided quickly, but the larger energy crisis did not begin to recede until realistic measures were passed to rein in the underlying causes of the problem; measures which cured irresponsible energy use and broke our dependence on foreign oil.

The situation with regard to insurance overage is no different today. Although individuals and businesses now can obtain insurance, they must pay steep prices that force a choice between cutting back on operations, lowering the quality of goods and the quality of life itself, or just going without adequate coverage.

LIABILITY PROBLEMS IN KENTUCKY

In Kentucky, this year, four out of five family-practice doctors gave up delivering babies, or greatly reduced the obstetric care they provided. About 20 percent of Kentucky's OB-GYN's stopped delivering babies. Why? Because malpractice claims in obstetric cases went up 46 percent this year. This loss hits rural areas hardest, Mr. Chairman, where the loss of a single doctor's services means the loss of all medical services in that area.

Now Kentucky is not a litigious State, Mr. Chairman. Yet doctors in my State, or rather the medical patients in my State, paid almost $100 million in two years, for malpractice premiums alone. The people in my State can't afford that kind of increase, Mr. Chairman. They demand an answer from us.

I could go on with other examples, but I will let the others who are testifying today give their evidence that the liability crisis has not gone away, that this crisis continues to erode our standard of living and deprive us of basic goods and services.

BROAD TORT REFORM—NOT PRODUCT LIABILITY REFORM—IS NEEDED

I would like to stress, however—since most of the witnesses today will be discussing the liability problems only of those who manufacture and sell products—that this crisis affects every American, every person who owns a business, who provides medical care, or runs a city, or organizes a club.

During the first quarter of 1987, the average liability insurance policy went up 20 percent in cost—during the first quarter alone. The only difference between last year and this year is that our liability costs are higher than ever before, and Con-

gress's interest in the broad issue of tort liability reform, for all Americans, is lower than ever before.

Nonetheless, some of us continue to forge ahead on solutions that we hope a majority of members in this body will support—solutions that return reason and justice back to our liability system.

TWO STUDIES: TORT REFORM BRINGS DOWN INSURANCE RATES

A few months ago, an independent study commissioned by the insurance services offices concluded that a package of simple, straightforward, yet comprehensive tort reforms would considerably reduce insurance costs in every type of lawsuit studied. This study used 1,200 insurance experts, studying a range of lawsuit situations, in 24 different States—15 of them already having tort reform statutes on the books.

The General Accounting Office also has released a report on the subject of medical malpractice, which unequivocally recommended changes in our tort recovery system—changes that the GAO found would substantially reduce the malpractice insurance component of the cost of health care.

The continuing liability difficulties faced by nearly all our constituents, together with reports like these, should prompt us into action, not only on limited products liability reform, but on meaningful reforms of our tort system—reforms which absolutely preserve the right of wrongfully injured plaintiffs to recover against the wrongdoers, but which protect those who are not culpable from expensive litigation and extorted settlements.

LEAVE PAIN AND SUFFERING AND CONTINGENCY FEE CAPS OUT

The kind of legislation which I am proposing, and have introduced as S. 554, would not place arbitrary caps on what a wronged plaintiff can receive in pain and suffering and punitive damages. During the course of the hearings which I chaired on this subject, I learned of occasional cases when such limits would work a great injustice.

Nor does S. 554 limit the contingency fees that plaintiff's lawyers often subtract from the plaintiff's compensation for his or her injuries. I happen to believe that such a reform would help the plaintiffs; but there are more former trial attorneys than former plaintiffs in this body, and the presence of such a provision in a lawsuit reform bill effectively would prevent the bill from passing. Thus, I have not included it, nor would I strongly recommend including it.

NEEDED REFORMS: STANDARDS OF WRONGDOING

Now let me discuss what is vital to any meaningful reform of our litigation system. These aren't radical changes; they're not even terribly controversial. But they are necessary to put some sense of reason and fairness back into our legal system. In fact, they closely resemble many of the reforms endorsed by the American Bar Association last February.

First, I think we all can agree that if justice means anything, it means that people shouldn't be punished unless they've done something wrong. In criminal law, we say that a defendant is "innocent until proven guilty." That's the least we can expect of our civil system as well.

This means that people shouldn't be buried in lawsuits and verdicts unless they've acted wrongfully, without reasonable care for the safety of others. It also means that a defendant shouldn't have to pay for all the damages if only marginally responsible for those damages. In my bill, a dependant has to be found at least 50 percent responsible for the damages to be assessed 100 percent of the damages.

These are not radical ideas. This is the way common law decided cases in this Nation for well over 100 years—until courts began breaking down standards of fairness and reason, to compensate anyone who judges felt sorry for.

ATTORNEY SANCTIONS FOR IRRESPONSIBLE LITIGATION

S. 554 also penalizes attorneys—for both plaintiff and defendant—who bring frivolous suits, or abuse procedure just to stall an action, forcing settlement or withdrawal of the suit. Our Constitution guarantees even criminals the basic right to a speedy trial; we ought to be able to secure this right for plaintiffs and civil defendants as well.

ALTERNATIVE DISPUTE RESOLUTION AND STREAMLINED SUITS

Related to this issue of a speedy trial, I believe we should consider strongly the untapped resource of alternative dispute resolution (ADR). While courts continue to

be clogged with lengthy and costly lawsuits, ADR increasingly provides an efficient, quick and fair resolution to most legal disputes. In S. 554, I require plaintiff and defense lawyers to inform their clients of these streamlined alternatives, and to certify this to the court upon filing preliminary papers.

Since introducing S. 554 earlier this year, I have pondered going further to promote the use of ADR. I propose before this subcommittee a provision that would allow the parties to agree on ADR, with the added stipulation that the chosen ADR forum reach a final disposition of the action within 90 days of the action's filing.

This would create an added incentive for parties to take their dispute out of court and reach an efficient resolution of the dispute in very short order. Of course, to make such a provision meaningful, it must be stipulated that any agreement to submit a matter to arbitration would be binding, and the decision reached by the ADR forum would be final and non-appealable, absent a clear showing of wrongdoing or abuse of discretion.

CONCLUSION: LET ACTION FLOW FROM THESE HEARINGS

I appreciate this opportunity to present my evolving thoughts on liability reform; I am pleased that hearings on this vital issue have resumed in the Senate. But with all due respect to those who have worked hard in bringing this hearing about, I should remind everyone that we have held many hearings on the lawsuit crisis, in every committee and subcommittee with any tangent of jurisdiction.

That is as it should be; liability reform is a complex matter, which we all need to learn more about. Ultimately, however, the true test of what we learn here is what we put into action. I lot of people back home are very worried about this issue. It will not go away, and those people back home are waiting for us to give them an answer.

Thank you.

Senator GORE. Thank you very much, Senator McConnell. Let me call on Senator Wilson, in case he has an opening statement.

OPENING STATEMENT BY SENATOR WILSON

Senator WILSON. Thank you, Mr. Chairman. I very much appreciate your calling this hearing on product liability, because I believe that it is a matter of great national importance, and that it continues to fester.

I quite agree with those who apparently indicated that it was a major problem, perhaps the major problem for small business, one that is robbing our economy of its strength while we continue to delay necessary remedial action.

I think it is in the best interest of the country for business and consumers alike to have a tort compensation system that is predictable. And I underscore the requirement for predictability.

I think the only way to achieve that predictability is through a national law. It makes no sense, as our economy reaches $4 trillion, for the United States to have 51 different sets of product liability rules.

This patchwork quilt approach has an impact on the free flow of commerce in our country, as significant as would the levying of tariffs by the states on imports from other states.

Like a tariff system, different product liability laws create varying degrees of liability as products enter different states. Actually a tariff system, though unconstitutional, might be preferable, for at least it would contain the element of predictability.

After all, why should businesses have to make distribution decisions based on the plethora of laws? And why should an injured consumer in one state be less well-compensated for injury by an Acme widget than a consumer in another state? It may very well

be possible to attract business to your state on that basis, but is that fair?

Preemption of state product liability laws, when considered in the light of today's economic realities is certainly not extraordinary, any more than is having our Food and Drug Administration and a Federal Trade Commission with national jurisdiction.

Federal preemption, I think, to be long overdue. It is my sincere hope that this hearing, along with the vast record already developed by the committee over recent years, will form the foundation for definitive action during the 100th Congress. Thank you, Mr. Chairman.

Senator GORE. Thank you very much. Our next witness is the Hon. Bruce Smart, Acting Secretary of the Department of Commerce.

Secretary Smart, we are delighted to have you here. We are going to put your full statement in the record, without objection. And if you could hold your comments to five minutes, it would be much appreciated.

STATEMENT OF HON. BRUCE SMART, ACTING SECRETARY, DEPARTMENT OF COMMERCE

Secretary SMART Mr. Chairman, thank you very much. I am delighted to be here.

I am substituting for Deputy Secretary Brown, who is currently recovering from surgery. He would have been glad to be here. I bring to this a perspective as a businessman, where I have spent most of my career.

I want to start out by emphasizing that we in the administration believe that injured persons should be compensated for the failure of a product to perform in a safe and reliable fashion.

We are not trying to reduce just compensation for those who have been hurt. That is the premise on which our tort system is based.

But as the present system has evolved, it has allowed excesses to creep in that go beyond that, and has become a mechanism for the random transfer of wealth from the great body of product users to a few who, by their circumstances, appeal to a judge or a jury and are able to obtain awards beyond any reasonable evaluation of the damages they have suffered through somebody else's fault.

I think underlying this evolution is a misconception widely held that firms and their owners have deep pockets from which they can somehow pay generous settlements without any further costs to anybody else.

Obviously to many of us, this seems economic nonsense. Court settlements are a risk of doing business. They are factored into product prices, just as labor and raw material costs are factored into those prices. That is true whether the corporation bears the risk directly, or whether it lays it out through an insurance company and by paying insurance premiums. So the everyday consumer ultimately pays for the settlements each time he buys the product that is involved.

Since the risk of failure tends to be higher on new products with less of a track record, these higher settlements have had a chilling effect on R&D and on the whole innovative process.

And desirable American products have been slower to come to market, or have been withheld because of the risks involved, even though in some cases they are safer than their predecessors.

Obviously this creates a disadvantage for American firms, compared to the circumstances encountered by their foreign competitors, and so is a disincentive to international competitiveness.

What specifically is wrong with our system? I think it has the following principal flaws. Over time it has separated liability from fault. That point was made by prior witnesses and by a number of the opening statements.

It permits huge awards for non-economic damages that are impossible to quantify. Clearly those do not happen all the time. But they are permitted and they happen all too often.

And third, the transaction costs that are involved in the system are excessive. What can we do to correct those flaws?

First of all, we clearly need to connect liability with fault. We need a tighter connection between product failure and the damages that are assessed. We need to remove the logic that says that the victim has been injured, he was using the product, the jury is compassionate, the manufacturer made the product, and therefore, the manufacturer should make the injured person whole, regardless of fault.

We need also to eliminate, or greatly modify, the concept of joint and several liability. I had a personal experience in which my firm had less than 3 percent market share, but had to pay 50 percent of the damages that were ultimately assessed for an injury that a jury had found us not guilty of on a criminal basis.

We need to limit non-economic damages. We need to put some ceiling on pain and suffering and on punitive damages so they do not inflate the cost of the system unduly.

And finally, we need to reduce the transaction costs, by encouraging prompt, reasonable out-of-court settlements, by removing the hope of huge windfalls, by increasing the predictability as far as companies and insurance companies are concerned, by reducing the huge contingency fees that lawyers are able to obtain. Those charges should be based on time and expenses more like those which prevail in the payment for other legal services.

Finally, I believe that it is really irrelevant whether an insurance company is involved or not. The system imposes costs in either case and I think insurance companies are almost a separate issue from this basic issue of product liability. Thank you very much.

Senator GORE. Thank you very much, Mr. Secretary. In President Reagan's inaugural address, on the first day of his administration, he said, and I quote, it is my intention to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people.

In light of the fact that tort law of our Nation has been left to the States for 200 years, why is it that the same administration that promotes States' rights and protects those rights reserved to the States now comes before this committee advocating that the

Federal Government impose on the States a Federal system preempting that authority which has been for 200 years reserved to the States?

Secretary SMART. Well, I am not a lawyer, sir. And so I cannot give you a legal argument. But I would suggest that most manufactured products are engaged in interstate commerce.

And as such, come under, in most of their manifestations, the Federal Government. If a manufacturer located in one State must consider the risks and costs of doing business in a total of 50 States, he is clearly faced with a much more difficult situation to deal with than if he has a predictable standard to meet that is constant across all of the 50.

And so from a logical point of view, it would seem to me sensible that we have some similarity, or at least some basic minimum set of standards that are applicable nationally. I would not remove the right of States to vary from that standard as long as they did not go beyond it or below it.

Senator GORE. Now, in your prepared testimony, you state that the current system makes American manufacturers less competitive than their foreign counterparts.

The Conference Board report, with which I am sure you are familiar, is a survey of 232 risk managers of large corporations put out by a business-related concern. It concluded that product liability pressures have a very, very small effect on these larger economic issues.

In fact, if I am quoting it correctly, the report said that two-thirds of the firms concluded that the part of the cost of products to consumers which they attributed to liability insurance is 1 percent or less.

How should the committee react to that Conference Board report? And how does it relate to your statement about competitiveness?

Secretary SMART. Well, first of all, the cost structure of any product is made up of a very, very large number of independent elements. To the extent that you can save even a small fraction of 1 percent, you enhance your competitiveness. Clearly a few cents on an automobile is very important to the manufacturer of that multi-thousand dollar product. Manufacturers go to great effort to design those costs out of their system. Product liability falls in that category for large firms. It is a manageable problem.

But if you will refer to that same report, you will see that the principal response of those companies, the most frequent response, faced with this problem has been to raise the price of the product to cover the costs.

Also, I do not think the report dismisses product liability as a problem as much as it states that it is one that is being managed by large firms.

I should point out that this report does cover only large firms, does not speak to the somewhat different problem of smaller firms who find it difficult to get insurance in some cases, or whose very existence is threatened by a single unfavorable verdict.

Senator GORE. But in your assessment of the effect that product liability is having on competitiveness, you do not challenge the

Conference Board finding that for these firms surveyed the cost was 1 percent or less of the product?

Secretary SMART. Those firms, large manufacturing firms, typically earn over the years something like 3 or 4 percent on sales. One percent of cost is a huge number.

Senator GORE. Senator Danforth?

Senator DANFORTH. Mr. Secretary, I appreciate your being here and your testimony. I know that the Commerce Department has taken a keen interest in this area for some time.

I can remember visiting with Secretary Baldrige on the subject. At the time, the administration had a fairly long list of what they considered to be the essential components of product liability reform.

And my only question to you is whether, as we proceed with this effort, the administration will be willing to show flexibility, to try to work with interested Members of the Congress toward something that could form the basis of some kind of consensus.

Secretary SMART. Absolutely, Senator Danforth. We have submitted a bill as a means of stimulating discussion and a starting point for addressing this issue. We are anxious, as well as willing, to discuss modifications or other ways of approaching it. We are looking for a solution to the problem, not for a specific set of provisions in the bill.

Senator DANFORTH. Thank you very much.

Senator GORE. Senator Kasten?

Senator KASTEN. Mr. Chairman, thank you, and Mr. Secretary, I am pleased that you will be working with us, as you have been working with us in the previous legislation.

As I said earlier, I am optimistic that this year we are in fact going to be able to put together all of the pieces. It is interesting to me that even the opponents of this legislation are now admitting that there is a problem.

But the question is how we fix it. And do we go industry-specific, or one thing for the doctors, one thing for the lawyers, one thing for the business community? Or do we instead have to have some kind of an overall Federal approach?

And I have looked at some of the statements that others are going to make after you, and it seems to me that we are all recognizing now that we have got a problem here.

In your statement, you said, we are hearing of more and more instances where companies are discontinuing products or refusing to place new products on the market, because of risks associated with the liability system. Industries like aerospace, sporting goods, chemicals, pharmaceuticals, are particularly exposed.

I was interested in these examples. You said that there were three manufacturers of polio vaccine, for example, a few years ago. And today there is only one left.

There were two manufacturers of the DPT vaccine, down from as many as seven at one time. And that the unit cost of that vaccine has gone from $2.80 in 1986 to $11.40 today. Most of that increase being attributed to liability costs.

In industries such as chemicals and sporting goods, aerospace, pharmaceuticals, and others, are you finding instances in which people are reluctant or hesitant to either improve their product be-

cause they are worried about the cases in which the improved product has been used as evidence that the old product could have been made more safely and therefore is unsafe?

Secretary SMART. If I understand your question, Senator, you are asking if this is evidence that people are resisting the introduction of something safer because its very existence would prove that the prior product was less safe and therefore vulnerable to attack? Is that correct?

Senator KASTEN. And that theory is developing in certain courts.

Secretary SMART. I do not have in my particular experience an example of that. I would be glad to go back and go through the information available to us and see if we can further elaborate on that, if you would like.

Senator KASTEN. I thank you, because it is our understanding, from the information we are getting from other areas, that in fact this is becoming a significant element in the decision-making process on introducing new, improved or safer products. And one of the things we can work together on is to find if we do have some specific cases.

Secretary SMART. In other words, you are doing it well now, therefore you are at fault because you did not do it better before.

Senator KASTEN. A typical example is the Ruger pistol, and this is a specific case, in which the gun was manufactured as safely as it could be, with a safety. In Alaska, unfortunately, someone left his car to go into a store—if I remember, it was a Seven Eleven.

He left a loaded Ruger pistol on the floor of his pickup truck with a seven or eight-year-old, maybe it was five- or six-year-old boy, also in the truck. He went in to pick up a loaf of bread or a six-pack of beer, whatever it was.

While he was in the store, his son tampered with the gun, the gun went off, an accident occurred. A couple of years later, Ruger improved that particular gun. Or maybe at the time Ruger had an improved gun, and this was an older gun. I do not remember.

The lawyer came in and said this accident would have been less likely to happen if the safety on this gun had been the new Ruger safety, as opposed to the older one. In other words, Ruger could have made the gun safer all along, and it was less likely that this accident would have occurred.

That theory is developing, I am told, in other areas and people are hesitant to put a new, better, improved, safer product on the market because of what they see with their better, newer product being used as evidence that the one that they have right now has been poorly manufactured.

In other words, by improving your product, you put the safety of your entire range of products that are presently in the marketplace at risk, is the basic underlying question. And I am just asking if you have more examples of that.

We have a few. And more are coming in. But I am interested in what kind of examples you might have.

Secretary SMART. Thank you. Without commenting on the safety of mixing loaded pistols, seven-year-old boys, and six-packs of beer, I will be glad to look into it.

That pistol was made in my hometown of Fairfield, Connecticut, and Bill Ruger is a friend.

Senator KASTEN. Thank you.

Senator GORE. Chairman Hollings?

The CHAIRMAN. It was probably David Wallace, was it not?

Anyway, with that particular example, and without the damage suit lawyers, that is what business does. They do not make that change, Senator Kasten, because economically they are in business for a profit.

And if there is no real pressure on them, if it was not for these plaintiff's lawyers bringing these suits, we would not have all these improved safety devices around.

Let me say something, Secretary Smart, Governor Edwards wants to greet you again. He asked me about you, and I told him I would be glad to support you as the Secretary of Commerce.

You have done a good job there. I support Secretary-designate Verity. I hope we can get him confirmed today. And you are a tremendous improvement from what they sent up here last time.

They had an Assistant Attorney General, I think, named Willard, and he came here with a bunch of paper clippings. It was an embarrassment. He would talk about Jury Verdict Research, had no authoritative source whatsoever.

Well, many of the same, incidentally, paraphrasings you use, and they all use, with respect to deep pockets, all these things. Of course, I told you about the ceiling on punitive damages.

We have got that in the State of South Carolina. Knock it out entirely. No ceiling on it, or limit on actuals, we can have that right now. They do it in most states, actually, they really do.

The change in joint and several: Florida found out, they changed joint and several, and all the insurance rates went through the roof. Go down there and look at the particular experience and the huge contingency fees, you just have to sit and reflect, and the deep pockets.

Because one of the last cases I brought, the poor wife had been to seven other lawyers, and I took that case on because I believed her about driving, running into a bridge abutment at night.

It really was not an abutment, it was a temporary thing that had come unfixed, and you will have to understand, I am not going into the case because I proved it all the way to the Supreme Court.

But anyway, it came through the window, and into the passenger, the husband in the back seat who was sleeping, went right through his eye and opened up his head. And where he was a wonderful train operator, he will never operate anything. He has got generalized brain damage.

And the first thing I did was get a deep pocket representative for him, the C&S Bank. So the title of the case was the C&S Bank versus the construction company. And I am listening to talk about deep pockets.

You do not know the trial law cases. I do, I have been in them. And people all on that jury have automobile insurance, they are all paying, most of them, on insurance on a home.

They know the high cost. It is against the law to mention that you have got insurance. But that deep pocket litany does not go very far out there in real life.

There are some large verdicts. But then there are a lot of losses. And when you come down to the huge contingency fees, Insurance

Services Office gave us that survey, for every dollar paid to claimants insurance paid an average of 42 cents in defense costs. While for every dollar awarded to a plaintiff, the plaintiff pays an average contingent fee of 33 cents.

Now you are saying the 33 cents is too much. Mind you me, this is for every dollar awarded. You know before I got the case to the Circuit Court of Appeals, I was told by everybody to settle that case.

And I only practiced with one other lawyer, this other lawyer and myself. We had to make a judgment. We had $27,000 invested in that case. Printing costs, all kind of other fees, and court costs and everything else.

These were poor people. They could not get a lawyer except on a contingency basis. And I represented insurance companies. And this thing about delays and delays, the fellow who delays is the insurance company, because he gets his hourly pay.

He fills out the form, he gives the secretary the depositions and the interrogatories, and goes back down to the club for a drink. I can tell you, if you are a plaintiff's lawyer, you have got to hustle and keep your fingers crossed and have a pretty clear, firm case, to convince all 12 in your own community.

There is nothing wrong with the jury system. This is an assault really on the jury system. We can go into that later. But as I said a minute ago, it was Davis-Bacon.

The Department of Commerce came up here and said, that was causing inflation, inflation. That is what you testified to in 1981 and 1982. Then inflation went down in 1986 to 1 percent.

And then you all forgot about Davis-Bacon, and got onto this product liability thing. And to get right to the point, the Department of Commerce, on the export of sales, I can give you example after example where the Department is not doing its work.

And you are really forbidding dumping cases and running American business out. It is not jobs. If you and I were to open up a business, it does not pay for you and me to open down in Ridgeland, South Carolina, we might as well go to Mexico and get ahead of the curve.

Because of the dumping and everything else at less than cost, and I do not have the time right now to go into all of these cases with the Department of Commerce.

But do not have a business groups complaining about deep pockets and all of these runaway juries and everything else, like something is wrong with the jury system when, if we as a Congress are really going to amend this law, it belongs in the judicial system.

It should come from the Attorney General and go to the Judiciary Committee, and not just for business to make a profit in the Commerce Committee and in the Commerce Department.

We are in the wrong forum, we are using all kind of phraseologies here that do not apply and do not have any basis in fact. And I will bring you all the Republican judges. You know Judge Wilkens?

Secretary SMART. No, sir.

The CHAIRMAN. Well, Judge Wilkens is a Reagan appointee and then was appointed not only district judge but circuit judge, and offered the head of the FBI.

He will tell you categorically, there is no product liability crisis in South Carolina. Runaway juries. I can give you a long list of the Republican judges.

And as a result of it, I made a survey at the University of South Carolina and we found out that there was not any runaway jury problem. There is no use to go into that.

But what we need to do is get to work on what we are not doing. We are losing our industrial capacity in this country because the Department of Commerce is not doing its work and running around here with product liability and tort cases.

One final point. Are you familiar with, do you know what they did, the Conference Board? They had the business crowd, where 232 major U.S. corporations, they put their survey out. And I am going to read from that survey of the 232.

The extent of the increase, however, has been small. In most firms, liability expense consists of three or four major components. The cost of insurance, litigation fees, settlement amounts, and sometimes overhead.

Only the first component, insurance, can be measured with any degree of accuracy. Therefore, respondents were asked, how much of the final prices of their products—that is what you talked about as the Secretary of Commerce here this morning—how much of the final prices of their products can be attributed to the cost of liability insurance?

For two-thirds of the firms, the answer was 1 percent or less. Now, that is better than the newspaper clippings from the Assistant Attorney General. These are the kinds of facts we need.

I have seen these stampedes before up here, and that is why over four years it has not gone anywhere. Because the Congress has deliberated, realized it was not our responsibility at the Federal level.

If they are going to assume it, they have to assume it on a more grounded basis than paper clippings or the expressions about deep pockets. I do not know of any of those deep pocket cases myself.

But I have seen them, like you have, from time to time, where I thought they were extravagant. But those are the exceptions.

And the cost really, at the insurance company level where that adjuster and that insurance lawyer, all he has got to do there is sit and smile and take the clients down to the club, and keep on smiling, and the secretary is filing the interrogatories, and everybody doing the investigating for him.

And he comes in the court room half-prepared. He does not even know the case. But it is another case for him, and he is going to be paid a certain amount anyway. And as long as he keeps the president of the company entertained on the golf course, he is going to hold his client.

The other crowd, representing the hungry poor, who have been injured, and trying to get proper compensation, have got to really hustle and really struggle. And when it comes through at the end, it is a victory.

There is not any question about it. And it is published. But it is deserved. And it has upheld our system. And that is why we have got the safe measures all around in these buildings and everything else like that. Because of the struggling lawyers who brought it through the public sector.

You can comment. I would like to hear you.

Secretary SMART. Senator, I am delighted to.

Senator DANFORTH. I thought the question was, do you know Judge Wilkens?

Secretary SMART. I answered that one, Senator.

I failed to take notes, Senator. So I will only address your comments in part. I do not have the memory I should have. I am not a trial lawyer.

Oddly enough, my son is. And since he is often, but not always, on the defense side of these cases, I hope he never meets Senator Hollings in front of a judge.

He has, however, been quite successful under lesser opposition. And some of the law stories, if you want to call them that, that are in the back of my mind originate with him and with some of the tactics that he has felt it necessary to use in order to protect a deep pockets client from undue assault in cases where fault was not an issue but rather the claim was spurious.

We obviously do not want in any way to reduce the proper compensation of people who have been injured through the actions of a faulty product. In fact, we want a prompter resolution so that there is not this tendency for some lawyers, not my son, to take their clients down to the bar and keep them happy while things drag on.

That is not a proper activity of the judicial system, though I must admit on both sides of many suits I have seen delay being a strategy.

We do, however, wish to have a system that does connect fault with damages, that does move expeditiously, and that does in some way limit or reduce the amount of non-economic damages that can be awarded because the jury becomes sympathetic.

I agree, certainly, Senator, that there are many judges and many state laws that allow the judge to prevent those things from happening. But when there is judicial discretion, it also allows the judge to not prevent them from happening. And it is that kind of an issue that we are approaching.

As far as the dumping matters in the Department of Commerce, I would very much like a list of the cases in which industry has brought a dumping charge that we have not vigorously and, within the time limits specified by statute, pursued that case to a conclusion under the law.

I think our record is very good. We handle over 100 cases a year, and we have yet, during the last several years, to fail to meet the statutory time limits for handling them.

The CHAIRMAN. Mr. Chairman, if I may respond. It is the Commerce Department's interpretation of the anti-dumping statute where you have given an offset to the exporter's sales price.

I am exporting, let us say, from Japan into the United States to a related party to one of my subsidiaries. You give him an offset for all of the promotional costs, sales costs, and the profits.

That is against GATT. We are trying to bring our practice, in spite of that Commerce Department policy, we are trying to bring our practice into conformance with GATT and all of our trading partners, where that offset is not allowed.

That is what I am talking about. I will give you the policy itself.

Secretary SMART. I am familiar with that difference of opinion, as we have discussed it in connection with the trade bill.

What we are trying to do is to trace the cost back to the factory dock of the producer in the foreign country, and make certain that the cost or the price at the factory dock for goods sold in that foreign country are not higher than the price at the factory dock of goods sold in the United States.

So we are concerned that in the deduction that is discussed here, you are making a deduction of costs in the United States case without making a similar deduction in the foreign case.

We want to compare apples to apples——

The CHAIRMAN. We are comparing apples to apples, in all the trading countries, and the general agreement of GATT does just exactly that.

That is where you are not getting apples and apples. What you are doing is allowing a subsidiary to locate in here, be sold at a lesser price. But to get his price up back to the domestic market, he then can put in all of those profits and advertising for taking over market share.

And that is exactly what he does. And that is why we are losing that market share and that is why it is futile to bring a dumping case under the Department of Commerce interpretation.

And that is what we are going to change in that trade bill.

Secretary SMART. Senator, before the conference is complete, I will look forward to visiting with you on the specifics of that in detail, because if your system is apples and apples, we will embrace it.

Senator GORE. Mr. Secretary, we want to thank you for your appearance here today. We appreciate it very much. Thank you.

Secretary SMART. Thank you very much, Mr. Chairman.

[The statement follows:]

STATEMENT OF HON. BRUCE SMART, ACTING SECRETARY, DEPARTMENT OF COMMERCE

Mr. Chairman, thank you for the opportunity to appear before this subcommittee to discuss the product liability problem. This situation is disadvantaging United States businesses both large and small, as well as American consumers. It is having a negative effect on U S. businesses' ability to compete against international competition through the added costs it imposes on our products, and the chilling effect it has on innovation.

The President has established the national goal of assuring American competitive preeminence into the 21st century. To achieve this goal, he has established a comprehensive program that enlists the broad resources of the Federal Government.

The Commerce Department has been charged with a number of responsibilities in the President's competitiveness program. Our responsibilities include eliminating unnecessary export controls, working to reform the foreign corrupt practices act, and making more useful the export trading companies program.

In addition, with the aid of the Department of Justice, we are charged with finding a remedy to the product liability dilemma facing U.S. business.

This problem is rooted in our tort system. It serves as a disincentive to research and development which is essential if we are to be competitive in the international market. It is a problem that cannot continue.

There is a widespread misconception that the costs of our product liability system are borne by corporations and their shareholders, who are perceived to have deep enough pockets so that they can afford to pay for any harm that is sustained. This is at odds with economic reality. The climbing costs of our product liability system result in higher prices for U.S. goods and services because they are costs of doing business in America. This makes U.S. products less attractive in both domestic and foreign markets.

We are hearing of more and more instances where companies are discontinuing products or refusing to place new products on the market because of risks associated with the liability system. Industries like aerospace, sporting goods, chemicals and pharmaceuticals are particularly exposed.

For example, where there were three manufacturers of polio vaccines, there now is only one. There are now only two manufacturers of DPT vaccine, down from as many as seven at one time. The unit cost of DPT vaccine increased from $2.80 in June 1986 to $11.40 today. A large amount of this increase can be attributed to liability costs. Citing product liability costs as the reason for its decision, G.D. Searle stopped selling in the U.S. Market its copper 7 contraceptive device.

In the area of general aviation, manufacturers have stopped or suspended production of certain product lines mainly because the average cost for product liability coverage in 1986 approached $100,000 per plane, compared to $70,000 in 1985. Beech Aircraft Corp. discontinued production of single-engine aircraft. In 1986, Piper Aircraft temporarily suspended production of nine general aviation aircraft models, citing product liability costs as an important factor. It has now resumed production of only one of these models. Cessna Aircraft suspended production of all of its piston-powered airplanes, again citing product liability costs as an important factor in its decision.

Chemicals are an area of manufacturing in which the U.S. enjoys a trade surplus. This week the chairman of Dow Chemicals told a group of Congressmen and business executives that his company incurred $200 million of excess costs due to risk management and regulations on its U.S. production, compared to the cost of producing a like volume of product abroad. Of this sum, he allocated $100 million to the "litigiousness" of our society, particularly product liability costs. Some companies in the chemical industry have reported premium increases of as much as 200 to 500%.

Finally, manufacturers of child car safety seats have refused to place new products on the market. As these U.S. manufacturers remove their products from the marketplace, they will be replaced by foreign-made substitutes or become unavailable to the consumer. Child safety will be reduced, not enhanced.

Product liability concerns have chilled research and development by both industry and the academic community. We are hearing reports of universities shying away from licensing patents to small manufacturers because of their fear that, because they spawned the idea upon which a product was manufactured, they will become the "deep pocket" if there is litigation involving the product. This type of situation threatens our leadership in R&D and new product development.

Manufacturers' decisions to withdraw from certain markets hurt our Nation's overall economic growth, lead to higher prices and rob us of socially beneficial products. Some manufacturers, mainly small businesses, will shut down, creating a loss of jobs.

Small businesses are particularly affected because they have less leverage in negotiating insurance rates and are less able to self-insure or utilize other insurance alternatives. That is why, last year, the business representatives who participated in the White House Conference on Small Business overwhelmingly decided that the number one issue that needed to be addressed with tort reform, particularly in the product liability system.

A number of causes have been suggested for the product liability crisis. A major contribution factor is the excesses that have crept into our legal system. For example, many people, from academics to state legislators, have recognized the potential unfairness and inequity of the doctrine of joint and several liabilty. That doctrine leads to unfair burdens on defendants with substantial assets. These "deep pockets" are brought into litigation because, all too frequently, an insignificant finding of shared liability guarantees a 100 percent responsibility for damages. The doctrine increases the unpredictability of tort liability because it exposes insurers and manufacturers to liability for the acts of persons the system may not be able to identify, much less cause to share in the remedy for damages they have caused.

Our system has moved away from liability based on fault as its guiding principle. The consumer must be protected and completely compensated for injuries caused by the fault of manufacturers of products. There is, however, a belief that businesses can and should be found liable and pay damages merely because they are "deep pockets" filled with assets which can be drawn on to compensate a person for a product injury sustained from whatever cause. Under our present system, CEOs throughout our Nation fear that when they manufacture a product they stand a chance of being found liable for any injury related to it, even though their company has acted responsibly and the fault lies with another party. As a former CEO, I participated in a number of decisions not to fight clearly unjustified suits, preferring to settle out of court for a known though unjustified sum, rather than run the risk of a

large jury award based upon compensation for the injury rather than evaluation of who or what was at fault.

Another reason for the need for reform is the patchwork of different State product liability laws which makes it difficult for businesses to determine which legal standard will apply to them or whether a particular standard will remain constant. The Federal Government must take a leadership role in the process of developing a coherent product liability system. The movement of products in interstate commerce is a national problem which requires a national solution. That is one reason why the President has made this issue a part of his overall competitiveness program. That is why, Mr. Chairman, I am pleased to see your subcommittee has decided to hold this hearing on the issue this year.

The enormous transaction costs associated with litigation also are out of control and overburden the system. It is difficult to justify extraordinary transactions costs, particularly when they are being borne in large part by the injured party and ultimately be consumers who must pay through higher prices for goods and services. A recent study conducted by the institute for civil justice of the Rand Corp. concluded that $16 billion to $19 billion of total expenditures for the tort system in 1985 was spent for costs of operating the system. Only $14 billion to $16 billion was paid in net compensation to victims. The deserving victims received less money than the lawyers and administrators who conducted the process. President Reagan's proposal to reform product liability law will promote the interests of consumers and protect the free flow of goods in commerce by placing reasonable limitations on the excesses of current law. It will ensure that our product liability systems compensate injuries caused by the wrongdoing of others. It will do so by returning the system to one based on fault and by ensuring that people are responsible only for damages directly attributable to their proportionate share of fault. Our approach will also reduce the unacceptably high transaction costs associated with litigation.

We need product liability reform and we need it now. Mr. Chairman, I look forward to working with you and all members of your subcommittee and this Congress to obtain meaningful reform.

This concludes my statement. I will answer any questions you may have.

Senator GORE. We have three panels of witnesses, and I would like to call the first panel at this time.

The Hon. Harry Carrico, Conference of Chief Justices. And Chief Justice Carrico is from the State of Virginia. The Hon. Robert Frey, with the National Conference of State Legislatures.

Senator Frey and Chief Justice Carrico, if you would come to the witness table, we would appreciate it. We are certainly delighted to have both of you here. I neglected to say, Senator Frey, you are from Kansas.

And we will begin with you, Chief Justice Carrico. Again, your complete statements will be included in full in the record. Without any objection. And we invite you to summarize your remarks to five minutes, if possible. And we will begin with you, Mr. Chief Justice.

STATEMENT OF HON. HARRY L. CARRICO, CHIEF JUSTICE OF THE SUPREME COURT OF VIRGINIA, ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES

Judge CARRICO. Thank you. I am delighted to be here, and I will abide by your time limitation.

I am appearing here today on behalf of the Conference of Chief Justices of the United States. The Conference is composed of the highest judicial officers of the 55 states and territories and the District of Columbia.

Senator DANFORTH. Judge, could you pull the microphone right in front of you please, and speak directly into it?

Judge CARRICO. Is that better?

Senator DANFORTH. Yes. Thank you.

Judge CARRICO. We appreciate the opportunity to express our views on the general subject of product liability, as it has been considered by the Congress in recent years.

These views are guided by the Conference's formal policy position which opposes Federal preemption of the tort law of the states. Under the policy, we have opposed all legislation that would replace state statutory and common law, governing the substantive rules of product liability and damages.

In doing so, we have not spoken from the perspective of the plaintiff or the defendant, but from that of the judicial officials who would have primary responsibility for administering the Federal law.

It is my understanding that this hearing is not directed at specific legislation. My testimony, therefore, will only be directed at the general observation that all, or most all, product liability bills of the past and present would preempt various parts of the tort law of the states as it applies in product liability cases.

We are not taking a position on the merits of the Federal standards proposed, but have directed our attention to the fact that these standards would be imposed without creating Federal jurisdiction or a Federal cause of action.

This means that the legislation, despite the Federalization of state law, would leave the trial of most product cases in the state courts where they traditionally have been tried, and that access to the Federal courts would come only through existing diversity of citizenship jurisdiction.

To come quickly to the point, we do not believe it is possible for Congress to preempt one area of the tort law of the states without creating new complexities for the Federal system, and unsettling the whole body of state tort law.

There is in short no quick fix for what some perceive as the shortcomings of the present system, particularly if uniformity is the principal goal. We should not forget that we did not suddenly arrive at the present state of the law, nor did we arrive here by chance.

Current doctrines were not devised by law professors on theoretical grounds. They developed over many decades to meet real but changing needs.

And reflect an accumulated wisdom, based on countless thousands of arguments before the courts and legislatures of the states, institutions with some claim to a role in the great American experiment in self-government.

Nevertheless, some say the law of product liability has gone too far; that the cost of production and the risks of business enterprise have increased inordinately; that liability insurance is either too expensive or unavailable; that industrial and commercial progress is unnecessarily limited.

Let us assume, for the moment, that tort and warranty rules have gone too far, an assumption I am willing to make only for the purposes of discussion, and that a reversal of the trend is needed.

Is Federal legislation the answer? First of all, if we are looking for a uniform set of laws, the answer cannot be found in Federal legislation. We already have a high degree of uniformity on major points of law.

This has been achieved over many decades through tens of thousands of cross precedents in case law relied on by the states.

The rules for product liability developed and recommended by the American Law Institute's Restatement of Torts, and the Uniform Commercial Code of the National Conference of Commissioners on Uniform State Laws, have been widely accepted.

What will the proposed Federal legislation do to uniformity? All related state law will be preempted, and the Federal law with new terms and new concepts will be substituted.

We must view these Federal standards as a single overlay on the 55 existing state and territorial court systems, as well as the Federal system, under diversity jurisdiction. The overlay will fit somewhat differently in each instance. It will impact some states more heavily than others.

But in each instance, we will have, in conjunction with existing state law and practice that remains unchanged, a unique new product liability system. And this new system will co-exist within an unchanged system for all other claims of tort.

It follows that the Federal standards, however well-crafted, will be applied in many different contexts, and that they will inevitably be construed and applied differently, not only by state supreme courts, but by the 13 Federal Circuit Courts of Appeals.

With each state starting anew, such uniformity as we have achieved to date will be destroyed, and the long process of interpretation to unravel new concepts will begin. In this process, state supreme courts will not be as they are today, the final arbiters of the tort law of their states.

Mr. Chairman, if I make no other point here today I want to make this one. And that is of extreme importance to us, sir, in the Conference of Chief Justices.

We have worked hard over a long period of years to enhance the prestige of the state court system. We think it is vital to the judicial system of this country as a whole.

But this legislation will take from the state courts an important part of their role in Federalism. No longer will the state supreme court's interpretation of state law, or law in the field of torts, be binding on all the state courts as well as all the Federal courts in that state.

It will be like any other decision on Federal law, with an appeal to the Supreme Court of the United States. And as my later statement shows, that Court is already overburdened and incapable of handling this new rush of cases.

I will rely upon the balance of my prepared statement, sir.

[The balance of the statement follows:]

STATEMENT OF THE CONFERENCE OF CHIEF JUSTICES

Federal statutory standards, even without federal question jurisdiction, will make the United States Supreme Court the court of last resort for a new class of cases with mixed state and federal questions largely outside its current jurisdiction. We will not only have state courts interpreting and applying a mix of state and federal law in the same case but we will have the lower federal courts, under diversity jurisdiction, interpreting and applying the same mix. A legal thicket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States, a court which many experts feel is already over-

burdened and incapable of maintaining adequate uniformity in existing federal law as it is variously interpreted by the 13 United States Courts of Appeals.

The consequences for federalism, as well as uniformity, are therefore incalculable. This is because no other federal law has reached so far into the substantive civil law which traditionally has resided in the states and which, under diversity of citizenship jurisdiction, also has been binding on the federal courts. The states will be forced to provide the judicial structure but will not be permitted to decide the social and economic questions in the law which its courts administer.

It also is clear that the pending bills, while limited to products in interstate commerce, have the potential for destroying the common law in the whole range of tort reparations. Certainly each state, in starting over in the product field, must weigh the impact of these standards on other areas of the law.

As former Chief Justice Jack Pope of Texas noted in earlier testimony before the Senate Commerce Committee, "States cannot, consistent with sound administration of justice (and) judicial economy * * *, have one set of rules to try product liability cases and a different system to try an ordinary negligence or malpractice case. Even the joinder of a physician in a products liability case concerning his administration of defective drugs, will require two different systems of trial and submission to the jury, or a complete overhaul of our state tort systems."

On the questions of federalism it also is important to note, along with Chief Justice W. Ward Reynoldson of Iowa, another of my predecessors as a Senate witness on this subject, that "it makes no sense to federalize a significant portion of state tort law while denying jurisdiction to the federal courts except under diversity of citizenship when diversity jurisdiction, in the view of most expert opinion, should be eliminated as a first step in reform of our dual system of state and federal courts." Federal intrusion in state tort law, as Chief Justice Reynoldson said, will throw "a great unknown" into what is, after some 200 years of development, "a carefully balanced national system of justice."

Allegations of excessive legal costs, excessive cost or products, and the excessive cost or unavailability of liability insurance are at the root of present federal proposals. If those allegations are true, the remedies lie with the states, where tort and warranty law have always resided. State courts and legislatures are well situated to determine the social and economic impact of present law on their own communities, and many legislatures already are immersed in product liability issues.

In closing I will comment briefly on an issue that, while not central to the current debate on product liability, has provided considerable background noise. We have all heard that there is a "litigation explosion". There is a widely held belief that our society is becoming ever more litigious, that we are far too willing to sue for damages and punitive awards.

We have not experienced this explosion in Virginia and I had assumed until recently that we were, for some unknown reasons, an exception to the general rule. A recent study by the National Center for State Courts has informed us, however, that we are not all that different.

It is important to note that this study contains data from only 20 states and was not directed at the substantive issues of product liability law. It asked, and sought to answer, only one question: Has there been a litigation explosion in the courts of the states?

To answer this question the researchers concentrated on four categories of civil cases that would best reflect a punitive mind set conducive to litigation: tort, contract, real property rights, and small claims. A careful analysis of the data, the researchers concluded, "provides no evidence to support the existence of a national 'litigation explosion' in state trial courts during the 1981–84 time period", the most recent for which data are available.

In the area of torts alone, which includes product liability cases, the study found that filings increased by 9 percent between 1978 and 1984 but that this increase was almost entirely offset by an 8 percent increase in population.

The overall data led the researchers to these conclusions:

"An upward trend in litigation in any one period is not necessarily attributable to an increase in the tendency of the average American to sue, but may indicate a simple increase in the number of average Americans.

"There may have been significant increases in civil filings which peaked around 1981; however, civil filings (defined as tort, contract and real property rights cases) decreased slightly during the 1981–84 period. In fact, in state courts that reported data for the 1981–84 time period, there were decreases in the total number of filings."

Interested parties have and will continue to debate the meaning of these findings. But the study is the most authoritative available and the burden of proof has shift-

ed to those who now would claim the existence of the explosion, in the state courts at least. Virginia statistics were not included in the study but, as I have indicated, they are consistent with the general findings.

This is not to imply, of course, that many state courts are not severely burdened by current case loads; that there are not serious problems of backlog and delay. But it does tell us there is some emotion mixed with the facts of those who speak of a litigation "crisis" or "explosion", and that state court systems, all things considered, might well be doing a creditable job.

The term "creditable" is used advisedly, knowing that much remains to be done. But it also means we are capable of addressing the issues raised by the product liability debate, and to do so in a mannr consistent with the orderly development of the law within our federal system.

I have submitted a copy of the National Center's study with my prepared statement and trust that it can be included in the hearing record. If the subcommittee wishes, we also will forward an update of the study which is to be published within the next few weeks. It is my understanding that the new data, based on 1985 filings, shows increased caseloads in some states, but a decrease or no change in others. The overall data, I am told, are consistent with the earlier findings.

Again, my thanks for this opportunity to express our views. I will be pleased to respond as best I can to any questions you may have.

Senator GORE. Thank you very much, Mr. Justice. The Hon. Robert Frey is a Republican member of the Kansas State Senate, representing here the National Conference of State Legislatures. Please proceed.

STATEMENT OF ROBERT G. FREY, MEMBER, STATE OF KANSAS SENATE, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. FREY. Thank you, Mr. Chairman. I would like to just briefly read a portion of my remarks that have been submitted concerning the issue of preemption.

Mr. Chairman, I think it is especially fitting that a member of a state senate would appear here before Members of the national Senate during this bicentennial week to address Constitutional issues.

It is this body, after all, that was constituted to represent the interests of the states, with Senators originally being chosen by their legislatures.

The Supreme Court, the United States Supreme Court, in its *Garcia* decision, that is *Garcia* v. *San Antonio Metropolitan Transit Authority,* a few years ago reassured the states with quotes from the Constitution's writers that equal representation of the states in the Senate would ensure against Federal encroachment.

It is no novelty, said the court, to observe that the composition of the Federal government was designed in large part to protect the states from over-reaching by Congress.

James Madison explained that the Federal government will partake sufficiently of the spirit of the states to be disinclined to invade the rights of the individual states or the prerogatives of their governments.

I have great respect for the United States Senate, and particularly for my own Senators, the distinguished Minority Leader and Senator Kassebaum. Yet I think I can understand that in spite of your concern for the Federal system, there would be a temptation to believe that every problem must have a national solution.

Justice Powell wrote in *Garcia* that such a temptation must be resisted. In the dissent joined in by Justices Burger, Rehnquist, and

O'Connor, he wrote that, by usurping functions traditionally performed by the states, Federal over-reaching under the Commerce clause undermines the Constitutionally mandated balance of power between the states and the Federal government. A balance designed to protect our fundamental liberties.

Continuing the historic pattern of tort law being defined by state legislatures and state courts, the states have now made tort reform and product liability reform a priority. Since January of this year, over 100 product liability bills have been introduced in the states.

The issue of tort reform is not one that offers easy solutions. Responding to various constituencies, through thoughtful experimentation, and then waiting to observe the results of our efforts are all part of our legislative process.

We are acting broadly and responsibly, and we have concluded that the problems are not so great that state legislative authority should be abandoned. Because the state legislatures are truly serving as laboratories of democracy with respect to this issue, preemption should be rejected.

And I will conclude my prepared remarks with that, Mr. Chairman, and be happy to answer questions.

[The statement follows:]

STATEMENT OF ROBERT G. FREY, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

FEDERAL PREEMPTION OF PRODUCT LIABILITY REFORM

Good morning. I am Bob Frey, Chairman of the Kansas State Senate Judiciary Committee. I am addressing you today as chair of the Law and Justice Committee of the National Conference of State Legislatures. NCSL serves all state legislators and legislative staff members. It represents the fifty state legislatures in addressing policy issues of national importance. I am also a member of the National Conference of Commissioners on Uniform State Laws.

Today the question is whether insurance availability and affordability can be improved by constricting the development of tort law in the states. The problem must be addressed in two parts: First, which tort reforms will work, and second, should such reforms be federal or state. NCSL policy addresses only the second question, resolving that preemption should be rejected. The policy is based upon constitutional considerations, and my testimony will begin by focusing on those considerations.

The policy was adopted several years ago and was reauthorized after a thorough debate at the 1986 Annual Meeting. This year, the policy was again confirmed.

PREEMPTION

It is especially fitting that a member of a state senate appear before members of the national senate during this bicentennial week to address constitutional issues. It is this body, after all, that was constituted to represent the interests of the states, with Senators being chosen by their legislatures. Constitutional amendments adopted in 1913—the power to levy an income tax and the popular election of Senators—modified the structure of government.

However, even as the Supreme Court was gutting the Tenth Amendment in its *Garcia* decision a few years ago, it reassured the states with quotes from the Constitution's writers that equal representation of the states in the Senate would insure against federal encroachment. "It is no novelty," said the Court, "to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Garcia* v. *San Antonio Metropolitan Transit Authority,* 105 S.Ct. 1007, 1018 (1985). "James Madison explained that the Federal Government 'will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.' The Federalist No. 46, p. 332 (B. Wright ed. 1961)."

I have great respect for the United States Senate, and particularly for my own Senators, the distinguished Minority Leader, and Senator Kassebaum. Yet I think I can understand that in spite of your concern for the federal system, there would be

the temptation to listen to every national interest group and believe that every problem must have a national solution. Justice Powell wrote in *Garcia* that such a temptation must be resisted. In a dissent joined in by Justices Burger, Rehnquist, and O'Connor, he wrote that "by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the federal government, a balance designed to protect our fundamental liberties." *Garcia*, Powell, J., dissenting, 105 S.Ct. at 1029.

Against these foundation principles of James Madison, James Wilson and others is set the desire of actuaries and statisticians to set predictable insurance premiums.

The tort systems that have developed in the states over the past 200 years have functioned well. They have been the product of legislative responses, jury deliberations and court interpretations. In each state, a body of law has developed giving guidance to producers and consumers. Before the patterns that have developed within the states are disrupted by an overlay of well-intentioned federal laws, probing inquiry should be made into the causes of any perceived problems in the system. If there is interest in moving to a more fault-based liability system, an appropriate first inquiry is, "Who is at fault for any problems in the system?" Although I will not answer that question, I invite your examination of the role of the state legislatures in responding to the "insurance" or "litigation" crisis; I am satisfied that our activities do not compel a national intervention.

Continuing the pattern of tort law being defined by state legislatures and state courts, the states have now made tort reform and product liability reform a priority. Last December, NCSL sponsored a two-day seminar in San Francisco that was attended by more than 250 legislators and staff; speakers addressed them on nearly every aspect of this issue. Since January of this year, over 14,000 bills relating to the "insurance crisis" have been introduced in state legislatures around the country. Perhaps a thousand relate to tort reform and product liability reform. That would be an average of about 20 per state, although not all legislatures were in session this year.

Bills introduced this year relate to every aspect of tort reform, including the following areas: immunities for directors and officers, non-profit volunteers and good samaritans; arbitration and alternative dispute resolution; assumption of risk; attorneys' fees; collateral source rule; comparative negligence; frivilous suits; interest on judgments; itemized jury verdicts; joint and several liability; liquor liability; medical malpractice; products liability; settlement offers; statutes of limitations; structured settlements and periodic payments. Some of these activities are set out in more detail below.

The issue is not one that offers easy solutions. Responding to various constituencies through thoughtful experimentation and then waiting to observe the results of our efforts, are all part of our legislative process. We are acting broadly and responsibly, and we have concluded that the problems are not so great that state legislative authority should be abandoned.

Because the states legislatures are truly serving as laboratories of democracy with respect to this issue, preemption should be rejected.

Some in Congress have been eager to press ahead with national solutions. However, it is still wise to wait and assess the results of our efforts. State legislatures can respond readily to changes in the development of tort law. If reforms do not bring desired results, we can make appropriate adjustments and the entire country would not have been subject to the miscalculation. For now, passing appropriate legislation should be a risk taken by the state legislatures and not by the national legislature.

The risk is real that national product liability law will not solve problems expressed by critics of the tort system. The goals of proponents of a federal law are affordability and availability arising from uniformity, consistency, predictability, and safety.

What about affordability? When we first started considering product liability reform in Kansas, our primary concern was availability and affordability. We asked the insurance industry what their suggestions were for tort reform, and we adopted several reforms. But when pressed on whether reforms would lower insurance costs, the industry was reluctant to make that assurance. Has anyone from the industry promised you affordability? If so, I encourage you to examine the proof, if any is offered.

This year Kansas made more changes to the tort system by placing caps on non-economic damages and limiting punitive damages in certain malpractice suits. Some states legislatures that have passed such reforms have had the laws turned down under the state constitution, indicating that preemption would strike not just at state statutes but at the very constitutions of the states.

As to predictability, I am somewhat perplexed that after Congress's experiences with annual tax reform, any interest group would argue that a federal law should be passed to assure predictability. Certainty cannot be enacted by law. If Congress were to proceed with national product liability reform, it would be in response to many of the same interests that propose such reform at the state level. Presumably Congress would watch for results and make amendments as needed. Yet when Congress acts, each state may be affected in different ways. If the initial attempt at uniformity by Congress did not bring the desired results new changes would be attempted, which would again affect each of the states.

Introduced so far this Congress are perhaps two dozen bills dealing with product liability reform. Although they may overlap in purpose, they often use different means to reach the goal. They are for general product liability reform and for specific industries such as aviation (H.R. 2238, S. 473) prescription drugs (H.R. 1207) and firefighter protective gear (H.R. 2647). More importantly, they seek reform through different means: One establishes a statute of limitations on product liability (H.R. 3053) and another is addressed to joint and several liability (S. 217). Others are more comprehensive, including S. 666, which has been referred to this committee.

Will safety be increased by preemption? The connection is dubious. Will safety be increased by product liability reform? Possibly. But the states legislatures are busy seeking answers to that question. On one side are those who argue that a system placing cost on the party at fault, rather than on the party who can best afford the cost, will increase care and provide an incentive for safety. They ask, "If you're going to pay, regardless of the safety of your product and the carelessness of the user, then why bother with safety?" On the other side are those who believe that lawsuits involving product safety point up serious defects, and that the awards to plaintiffs and attorneys are incentives to challenge dangerous products.

With respect to consistency, it may be admired in skill and craftsmanship; but consistency is not a principle fundamental to the governing of our country. Consistency may be efficient; but democracy is not about efficiency. The tradition of the common law, the reverence for the jury system, and the right of the states to govern in matters affecting the welfare of their people are all principles of greater stature.

My service on the National Conference of Commissioners on Uniform State Laws has heightened my awareness of the value of uniformity in some areas of the law; but it has also made me appreciate the sound judgment of independent state legislatures that are able to adapt or to adopt laws that most closely respond to the needs of their constituents. Several proposals would blend state and federal rules of law in tort actions. By conceding that uniformity is not really possible, proponents of preemption lose any force their argument might have had. Attempting to codify the fluid development of tort law cannot insure consistency of interpretation.

JOINT AND SEVERAL LIABILITY

A closer examination of one aspect of various federal proposals can show how state laws might be affected. In the Administration bill (S. 711) Section 106 proposes the abolition of joint and several liability for product liability actions covered by the Act. S. 666, Section 307 proposes abolition of joint and several liability for noneconomic damages in product liability actions. S. 554 would abolish joint and several liability, except where a person's proportionate responsibility for the injury is greater than 50 percent.

Two issues come to mind because of these divergent proposals. First, there was no specific reference to the interplay of comparative fault standards that exist in the states, and no reference to contributory negligence standards, which exist in some states. I believe the interplay would create continued uncertainty, as long as the issue was not resolved. Second, the existence of varying proposals at least suggests that proposals could be made in consecutive sessions of Congress to amend the uniform product liability act depending on changing views of fairness. Thus, uncertainty remains inevitable.

The evolution of joint and several liability law in Kansas may provide insight into the difficulties of attempting to superimpose a federal rule of law on fifty state tort systems.

Because light aircraft have received special attention in the product liability debate, I might also mention that I am a pilot in a state that builds half the planes built in America. I am aware of the problems of aircraft manufacturers. Some of their financial difficulties relate to insurance premiums; other factors include the fact that as one of America's best built products, airplanes are not replaced frequently. In addition, some of our markets in the southwest are in economic recession.

In 1974, seven years before enacting a product liability reform act, the Kansas legislature adopted comparative negligence with the following language:

"Each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of all causal negligence attributed to all parties against whom such recovery is allowed." Kan. Stat. Ann., Sec. 60-258a.

By abandoning contributory negligence with this language, it appeared that joint and several liability was also abrogated. Yet this language awaited the interpretation of our State Supreme Court four years after passage, to complete the elimination of joint and several liability. Even where one or more parties could not be joined and held legally liable for his or her proportionate fault, the Court held that other defendants would not be held liable for more than their share of fault. *Brown* v. *Keill,* 224 Kan. 195, 580 P.2d 867 (1978).

In 1981 we adopted a modified version of the Model Uniform Product Liability Act proposed the previous year by the U.S. Department of Commerce. (44 Fed. Register No. 212, 62714-62750). In passing the Kansas Product Liability Act, (Kan. Stat. Ann., Sec. 60-3301), we accepted some of the rationale of the Department of Commerce, based in part upon our being persuaded that product sellers and insurers might benefit from greater uniformity among the states. My concern for the industry is real, but my regard for the principles of federalism guides my thinking in this area.

In 1982, the Kansas Supreme Court was asked to interpret the comparative fault statute in the context of a product liability suit involving an infant plaintiff. The court once again reiterated its position that abrogation of joint and several liability barred recovery, even where the two year old plaintiff was free of negligence as a matter of law. *Lester* v. *Magic Chef, Inc.,* 230 Kan. 643, 641 P.2d 353 (1982). If the legislature did not intend such a result, the court said, it could address the issue again.

The policy consideration stated by the Kansas court in abolishing joint and several liability with the adoption of comparative negligence was based upon a *quid pro quo:* if a plaintiff no longer had to be entirely without fault to recover damages—as was the case with contributory negligence—then a defendant should not face the prospect of paying more than the portion attributed to their own fault.

INCONSISTENT INTERPRETATIONS

Inconsistent interpretations inevitably follow codifications, and federal legislation will not insure consistency of interpretation any more than state codification insures consistent interpretations within the state until resolved by the highest court. If Congress is seriously considering adding interpretations of tort law to the burdens of the United States Supreme Court, it might consider calling for the testimony of a Justice on the subject.

Did the adoption of comparative fault require the same judicial result in the courts of other states? Clearly not. In California, for example, after the adoption of comparative negligence, the Supreme Court retained the doctrine of joint and several liability on policy grounds. The court said that "abandonment of the joint and several liability rule would work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries." *American Motorcycle* v. *Superior Court,* 20 Cal. 3d 578, 590; 578 P.2d 899, 906; 146 Cal. Rptr. 182, 189 (1978).

Although I am not familiar with the details of subsequent California legislative history, it is my understanding that the legislature, in response to Proposition 51, limited the joint and several liability concept so that defendants are not jointly, but only severally liable for non-economic damages. (Cal. Civ. Code Sec. 1431.2) (1986).

The change to comparative negligence did not insure consistent interpretations of the related concept of joint and several liability. Similarly, the adoption of a uniform federal rule of law would not guarantee greater consistency among the states.

STATE ACTIVITY

As of July 31 of this year, five (5) states had placed caps on noneconomic damages. (ID, KS, MT, ND, OR). Punitive damage reform was more popular, occurring in 13 states, (AL, FL, GA, ID, IN, IA, KS, MO, MT, ND, OR, TX, VA). Periodic payments on judgments were approved in four states. (AL, ID, MT, ND). Three states regulated attorneys' contingent fees. (CT, OR, WA). Sanctions for frivolous suits were approved in 8 states. (AL, NE, ND, OH, OK, OR, TX, WA).

This year, major tort reform legislation was introduced in several states, including Arizona and Tennessee and Texas. In Tennessee, the bill died upon adjourn-

ment. In Arizona and Texas major reforms were enacted. In Texas, a special session of the legislature was called to deal specifically with the issues of tort reform and liability insurance. Six bills were signed into law. Senate Bill 5 made several changes in tort law, including provisions for sanctions for frivilous pleadings and caps on punitive damages.

With respect to comparative liability, the new Texas laws would permit recovery of damages in a negligence case only where the plaintiff is not more than 50% at fault. Where the cause of action is based on strict liability, product liability or breach of warranty, the claimant would have to be less than 60% at fault. Joint and several liability would be based upon the degree of fault. The right of contribution would remain, and awards could be offset by an amount of settlement received from one of two or more joint tortfeasors.

One of the central issues of federal proposals and state reforms is joint and several liability. Fourteen states enacted some such reform. (AZ, CO, CT, GA, ID, LA, MO, MT, NV, NM, ND, OR, SD, TX). To get some idea of how legislatures mold laws to reflect local and community standards, a review of some of the various joint and several liability provisions is useful. The trend is definitely toward abolishing or limiting joint and sereral liability, but states are doing it in different ways.

In February of this year Arizona enacted a law that abolishes the doctrine of joint and several liability where fault of persons would be considered, whether or not named as parties. (S.B. 1036)

Idaho enacted a bill that limits joint and several liability to instances where the parties acted in concert and in other limited circumstances. (S.B. 1223)

Pure several liability or total abrogation of joint and several liability has been followed in several states besides Kansas. For example, Colorado and Wyoming limit a defendant's liability to his or her percentage of fault. In such a state, the trier of facts—that is, the judge or the jury—determines causal responsibility among all wrongdoers, including those who are not parties to the suit.

In some states, assessment of several liability does not necessarily include all wrongdoers responsible for a loss. In Connecticut, for example, responsibility is apportioned among only the parties to the lawsuit.

Another approach is to limit the applicability of joint liability to specific types of damages. In California, joint liability is abolished for non-economic damages but retained for economic damages. Some state retain joint liability for damages arising from hazardous waste.

Other modifications look to the degree of fault. In New York and Alaska a defendant less than fifty percent responsible can be held liable for no more than his share of damages. In Illinois, Hawaii and West Virginia, the defendant must be less than 25% at fault to avoid joint liability for non-economic damages.

In Washington State, the legislature abolished joint and several liability in most instances, but retained it where the plaintiff was free of fault. This choice by the Washington legislature suggests that they would find unfair the decision of my state to abolish joint and several liability even where the plaintiff is free of fault as a matter of law.

CONCLUSION

In the context of this considerable activity it would be unwise for the Congress to move into a field where the effects of these changes have not yet been evidenced. it is unfair for Congress to suggest that the states should be expected to adopt a uniform law on this matter, when the state legislative debates over appropriate reforms are at least as lively as the debate over the issue in Congress.

Our federal system of government fosters creative, thoughtful and necessarily different attempts to respond to contemporary problems. Because the broad area of tort reform offers so many thorny and interrelated issues, it might be easier for the states to turn the matter over to Congress. But such a reaction would undermine the responsible activity that has already been taken by the states.

There is no convincing reason to unravel a tort liability system that has functioned well and responsibly for 200 years. There is no compelling evidence that preemption would achieve the elusive goal of uniformity.

CIVIL JUSTICE REFORMS - STATE ENACTMENTS 1987

NATIONAL CONFERENCE
OF STATE LEGISLATURES

July 31, 1987

		1 Caps on Non-Economic Damages	2 Modify Joint & Several Liability	3 Sanctions for Frivolous Suits	4 Punitive Damages	5 Grant of Immunities					
ALABAMA					X						
ALASKA											
ARIZONA			X								
ARKANSAS						X					
CALIFORNIA											
COLORADO			X								
CONNECTICUT			X								
DELAWARE											
FLORIDA					X	X					
GEORGIA			X		X	X					
HAWAII											
IDAHO		X	X		X	X					
ILLINOIS											
INDIANA					X						
IOWA					X	X					
KANSAS		X			X	X					
KENTUCKY											
LOUISIANA			X			X					
MAINE						X					
MARYLAND											
MASSACHUSETTS											
MICHIGAN						X					
MINNESOTA						X					
MISSISSIPPI											
MISSOURI			X		X						
MONTANA		X	X		X	X					
NEBRASKA				X							
NEVADA			X			X					
NEW HAMPSHIRE											
NEW JERSEY						X					
NEW MEXICO			X			X					
NEW YORK						X					
NORTH CAROLINA						X					
NORTH DAKOTA		X	X	X	X	X					
OHIO				X							
OKLAHOMA				X		X					
OREGON		X	X	X	X						
PENNSYLVANIA											
RHODE ISLAND						X					
SOUTH CAROLINA											
SOUTH DAKOTA			X								
TENNESSEE											
TEXAS			X	X	X	X					
UTAH											
VERMONT											
VIRGINIA					X						
WASHINGTON				X		X					
WEST VIRGINIA											
WISCONSIN						X					
WYOMING						X					

Column 1-Total of 11 (1986 & 1987) 3-Total of 20 (1986 & 1987) 5-Total of 44 (1986 & 1987)
2-Total 25 (1986 & 1987) 4-Total of 9 (1986 & 1987)

Senator GORE. Thank you very much. Before going to questions, I want to acknowledge the arrival of Senator Pressler. Do you have an opening statement?

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. I do have an opening statement and I will place it in the record.

Mr. Chairman, let me begin by thanking you for holding these important hearings. I appreciate your willingness to have this issue aired.

I am a cosponsor of Senator Kasten's product liability reform legislation, and have authored legislation on the issue of joint and several liability, which was again introduced in this Congress. Since first supporting this type of legislation in 1980, my position has remained basically unchanged. We need this legislation now more than ever. As I have said many times in the past, tort reform remains one of the most important consumer issues of our time. The present law in this area continues to push upwards the price of products and it places our country at a decided disadvantage in the international marketplace. The need for reform continues to increase. But still, we do nothing. This must change.

It has been encoruaging to note the substantial amount of tort reform that has taken place during the past two years in state legislatures throughout the country. These reform efforts have made great strides in returning some sanity to the law of torts.

With the level of reform activity in the states, one might question the need for federal action. But we do need federal action. The problem with a state-by-state approach is that it lacks uniformity. Without uniformity in many areas of tort law—particularly product liability—reform becomes largely ineffective. And the state actions of the past couple years certainly lack uniformity. As an example, let me point to the area of joint and several liability, with which I am most familiar. I recently wrote a law review article on this subject which included detailed research on state actions. In the past two years, twenty-six states have enacted joint and several liability reforms. However, there are hardly two states in the entire group which used the same language. As a result, we continue to see problems of forum shopping and unpredictability. This is particularly true in areas which transcend state borders, the best example of which is product liability.

So I hope we can go forward on this extremely important consumer issue. Again, I thank the Chairman for holding this hearing and hope we will be able to schedule a vote sometime this year. Thank you.

Senator GORE. Justice Carrico, I am concerned with the practical problem you referred to in your remarks: namely, that state courts might be required to apply both a new Federal law and traditional state law in a single action.

For instance, if an individual is injured by a drug prescribed by his or her doctor, and then sues both the doctor and the manufacturer of the drug, the suit against the manufacturer would be governed by the Federal law, while the suit against the doctor would be tried under present state law.

Is that your conclusion? And if so, how would a trial judge handle that situation?

Judge CARRICO. Well, that is my conclusion. And it is one that cannot be avoided, if the legislation is passed.

The judge would have to attempt to try to keep the two things separate by instructions to the jury.

Senator GORE. Would the same jury be required to handle different standards from two different laws in the same action?

Judge CARRICO. Well, there is no provision in the Federal law that would require or permit a bifurcated trial. And the state law would not permit it now.

Unless legislation provided for a bifurcated trial, using the same jury would be the only way to handle it. It would be quite a technical problem for lay jurors to understand, I think. But I suspect a real problem will emerge for the two defendants, with perhaps neither one happy in the end.

If the less innocent one gets tabbed with the guilt of the other, the technical distinctions between the two systems might be ignored by the jury, I suspect.

Senator GORE. Well, that would seem to be a significant practical problem. I will be interested if other witnesses want to comment on that.

There has been such a controversy over the actual facts of what has been happening with jury awards and the data has been controversial and argued over.

What is your experience as a judge, as a justice, and as someone speaking for the Conference of Chief Justices? Do you believe that juries are running wild? Is that your experience, that they are not able to be controlled by trial judges and courts at the state level?

Judge CARRICO. That is not my conclusion, sir.

Senator GORE. That conflicts, you would agree, with what many have as their perception of this matter.

Judge CARRICO. Well, of course there are individual horror stories that you can read about. As a general rule in Virginia, we do not have that situation.

Juries can run wild on occasion. But I think we have able trial judges who are able to identify those cases in which that occurs, and correct it either by setting the verdict aside and ordering a new trial or requiring the plaintiff to accept a lesser verdict or face a new trial.

Or, my court is authorized by statute to reduce the verdict itself, or to order a new trial limited to the guestion of damages.

Now, I disagree, and a survey made by the National Center for State Courts, which is mentioned in my full report, disagrees with the proposition that there is a litigation explosion in this country.

The updated version of that report will be sent to you, if you would like it. It will show that there have been increases in some states, while in others there have been decreases, and overall, maintenance of the same level of the number of cases filed.

As I say, you can read these individual horror stories, and the whole system then becomes festered with that sort of an idea. We in Virginia are particularly strict on the award of punitive damages, both by way of statutory limitation and by judicial opinion.

The cases that we see with large verdicts on some occasions have been reduced by the judge. In others they are warranted, and it is the responsibility, when the evidence, sustains them, for the trial judge to confirm them and for us to affirm the judge's decision.

Senator GORE. Well, I might say that in my home state of Tennessee, from 1978 to 1984, the population rose 6 percent, and civil filings rose 5 percent.

Of course, our state has fewer civil suits per 100,000 citizens than any other state. From 1980 to 1985 there were only 12 product liability cases tried all the way to a verdict, with the highest verdict under $150,000.

Senator Frey, my time has expired. I found your testimony most interesting. Senator Danforth.

Senator DANFORTH. No questions, Mr. Chairman.

Senator GORE. Senator Kasten?

Senator KASTEN. Judge, in your testimony, you said that the states have achieved such a high degree of uniformity in major points of product law that Federal legislation does not offer a solution.

That is widely at variance with most of what we have learned over the past several years. Are you saying today that the product law of California, and the product law of New Jersey, which are two extreme examples, generally speaking from our testimony over the years, is uniform with that of Virginia?

Virginia is thought to have a relatively conservative and a relatively balanced, if you will, product law. And I find it difficult to agree, if you are telling us that California and New Jersey are the same as Virginia.

And I would particularly think in areas of what constitutes a defect, for example, or defenses available that there is just a wide discrepancy. In Virginia, you may have a system that is working with checks and balances.

But there are no checks, and there are very few balances in some of these other examples. Could you explain to me what you meant if you did not mean that Virginia is the same as California and New Jersey, for example?

Judge CARRICO. No, sir, I did not mean that. But I can say that there are occasions when we will cite California law for a proposition in one of our opinions, if we have no precedent of our own to cite, and it seems to fit in with what our concept of the law in Virginia ought to be.

But that does not mean that case by case, or in the overall view, that our law is like California's. But that is what legal research is all about, if we cannot find an opinion of our own that is authoritative or helpful, we look to the law of other states.

And it is only natural that we accept that law and follow that law which we like, that we conceive to be what the law of Virginia ought to be. And through that process, and through the use of texts and treatises and research devices, we can identify those cases.

Senator KASTEN. But you would agree with me that there is not a high degree of uniformity between California, New Jersey, and Virginia, with regard, for example, as to what constitutes a defect?

Judge CARRICO. That is right.

Senator KASTEN. There is a very low degree of uniformity in that very important area. You would agree with me on that?

Judge CARRICO. For the same reason, I would say that I do not think that a high degree of uniformity will be achieved under Federal legislation. Because the terms that are involved are subject to interpretation by those same states.

The fact that it is a Federal law is not going to change that at all.

Senator KASTEN. I understand that you have a difference with us, who are proponents of a Federal law.

Judge CARRICO. Yes, sir, I do.

Senator KASTEN. That is not my question. My question is, I am trying to get at how we define this high degree of uniformity in major points of product law.

I just want to ask you one other question. Do you agree with me that there is not a high degree of uniformity in California, New Jersey, and Virginia, with regard to defenses that would be available in product law cases? That there is a wide range in that particular area as well?

Judge CARRICO. There again, we are dealing with words and interpretation of words. If you mean high degree of more than 75 percent, I would say no, sir. There is not that high degree.

But there is a degree which, I think, as the law progresses, does increase, as reasonable and logical opinions are written by the courts of the various states on subjects that arise and are accepted by other states.

Senator KASTEN. Judge, how do you respond to another distinguished District Court judge, Judge Edgington, who is a member of the American Bar Association, also a distinguished judge, who asserts that as early as 1970 there was a need for a major Federal role in the development of product liability law?

And further, how do you respond to this judge's description of product law as "a hodge-podge of tragedy-inspired responses to challenges"? Now, here is a distinguished judge who describes what you have described as high degree of uniformity as a hodge-podge of tragedy-inspired responses to challenges. Now, this certainly does not indicate uniformity.

Judge CARRICO. 1970 goes back pretty far, considering the way things are happening these days.

Senator KASTEN. He asserted that as early as 1970——

Judge CARRICO. I understand that.

Senator KASTEN. It began, and then it has then——

Judge CARRICO. Well, it may be. But over that period of time, the work of the American Law Institute has become more defined and more productive in its Restatement of the Law of Torts, and has received much more acceptance than it did before.

And that is one of the bases, I think, that permits the states to achieve a degree of uniformity, because it is becoming more accepted. And I would say that there has been a substantial increase in acceptance over that period of time.

Senator KASTEN. Mr. Chairman, I have no further questions.

Senator GORE. Thank you very much. Chairman Hollings.

The CHAIRMAN. Chief Justice, I hear the questions, and I am beseeching you relative to uniformity.

You and I know as practicing attorneys that we have, as you have indicated, a degree of uniformity. And regularly, we have got the American Law Institute, we have our restatement of torts.

I think that Chairman Gore's law professor at Vanderbilt rewrote the restatement of torts on product liability, and we bring about that uniformity. Now these Senators that want uniformity put in a bill to have insurance Federally regulated, to get some uniformity there, this committee has been trying for years to get the facts and figures out with respect to the losses and the cost and the profits.

And they just run us around and around the mulberry bush. I have been on this committee 20 years. We cannot get that. I think I will have to put in a law to just go ahead and Federalize insurance.

They seem to have a great difficulty, want all kind of uniformity when it comes to trying a case. Well, you have got different laws in different states. But have no difficulty at all hiring a lawyer to get all of their particular insurance policies filed at the state level, and fight you like a tiger if you talk about Federalizing insurance. So we can get some uniformity.

I think this really is highlighted in your statement here, that the states will be forced to provide the judicial structure, but will not be permitted to decide the social and economic questions in the law which its courts administer.

I mean, that is bottom line. You are deciding in Virginia. Do you have, by the way, a tort crisis in Virginia?

Judge CARRICO. I do not think so, Senator.

The CHAIRMAN. We do not have one in South Carolina either, and the distinguished colleague from Wisconsin mentions California.

It is the Senator from California who has a national product liability bill in, has introduced one, Senator Cranston. Do not give me that. I can tell you that right now.

That is what this Congress would end up with. This business crowd does not understand their own interest, what is good for them. The Cranston bill is on insurance.

Mr. Justice, on the various terms, here we have the denial of Federal jurisdiction, but the requirement of the enforcement of the Federal statutes in these courts. And all in the name, of course, of saving money.

Now I am going to try my case, and Senator Kasten try his case out in Wisconsin, and the Wisconsin court will interpret different phrases under this statute. And South Carolina courts would interpret the phrase perhaps differently and go to my supreme court and his supreme court and all around.

And you have got a jambalaya of interpretations in the 55 different jurisdictions around. Do you see this saving costs, saving money? Or getting uniformity or not?

Judge CARRICO. I do not, sir. And I do not see any savings in delay.

There is a settlement procedure built into some of these bills that is going to delay the ultimate disposition of cases. For example, one of them will extend the filing for response in our state from 21 days to 60 days right off the bat.

Of course, if it helps settle cases, that is fine. But generally by the time the parties get to that point of the game, the possibility of settlement has been pretty well explored.

Of course, there are cases settled after suits are filed. But it seems to me that offsetting the delay that is caused by the settlement procedure itself against the few new cases that might be settled, the disadvantage is greater than the advantage.

The CHAIRMAN. Delays; they were talking 20 years when I was in the courtroom. You folks at the supreme court levels in the various states have disciplined these lawyers.

We have the integrated bar, you require the refresher courses, you keep the dockets up to snuff. I remember the delays that we used to experience. All cases are tried within a year, and the average one is within six months in the State of South Carolina.

I mean, they really, they have got that docket up and those judges, under the aegis of the supreme court, and again the supreme court in Virginia, they have done a remarkable job.

And of course, coming up generally, we politicians at the national level just use descriptions in a general sense, like, you know, deep pockets and delays and everything else of that kind.

That is not the experience as you know it in the several states. Is it?

Judge CARRICO. No, sir.

The CHAIRMAN. I appreciate it very much. Thank you.

Senator GORE. Senator Pressler?

Senator PRESSLER. There is one portion of my opening statement that I wish to address a question to both of the witnesses.

First of all, let me say that I am co-sponsor of Senator Kasten's present product liability reform legislation. And I have authored legislation on the issue of joint and several liability, which I introduced in this Congress again.

I first supported this type of legislation in 1980. It is my strongest belief that this is one of the great consumer issues of our time, and I have told that to Ralph Nader. I think consumers are paying much higher prices for not only products but also services.

We have had day care centers, for example, in my state close because of insurance problems. Although that is not directly related to product liability it does go to the overall problem of a tort system out of control. But I think American consumers are both losing services and goods and they are paying higher prices for them when they are available.

I also think it affects us internationally, in terms of making us less competitive. We talk a lot in this committee and elsewhere about competitiveness, but often fail to articulate what needs to be done to correct the problem. I think product liability reform would be a big step toward enhaving our competitiveness in some areas.

The White House Conference on Small Business placed the cost of insurance and doing business in this area as the number one priority that they would like to see Congress address. Let me say that it has not been addressed. And in the small business committee just yesterday we were talking about sponsoring, or urging that another national conference of small business be held at the White House.

But it was pointed out that the number one priority of the small business community has not even been addressed. So it is very appropriate that we take up this legislation.

Now, it has been encouraging to me—and this is my question to the witnesses—it has been encouraging to me to note that a substantial amount of tort reform has taken place during the past two years in state legislatures throughout the country.

And these reform efforts have made great strides in returning some sanity to the law of torts. With the level of reform activity in the states, one might question the need for Federal action.

Indeed it is said we are trying to Federalize this matter. And being a Republican, that seems to run against the campaign promises that we make. But in this case I think we do need Federal action.

And the problem with the state by state approach is that it lacks uniformity. Without uniformity in many areas of tort law, particularly product liability, reform becomes largely ineffective.

And the state actions of the past couple of years certainly lacked uniformity. As an example, let me point to the area of joint and several liability, with which I am most familiar.

I recently wrote a law review article on this subject, which included detailed research on state actions. In the past two years, 26 states have enacted joint and several liability reforms.

However, there are hardly two states in the entire group which use the same language. As a result, we continue to see problems of forum shopping and unpredictability. This is particularly true in areas which transcend state borders, the best example of which is product liability.

So I hope we can go forward on this extremely complex consumer issue. But I would like to ask each of the witnesses, how do we deal with the matter that while it is true 26 states enacted reforms, they are all different. Will we not continue to see forum shopping and unpredictability, which the Kasten legislation or uniformity in general would solve?

Mr. FREY. Well Senator, I think that the Justice would probably be able to respond more to the question.

But I would say this, that first of all I do not know that uniformity is necessarily all that desirable in this area, unless we can establish some reason why uniformity is needed.

In our state legislatures, we have been listening to the cry for tort reform for a long time. I have been in the legislature for 14 years and have been the chairman of both the House Judiciary Committee and the Senate Judiciary Committee, and I presided over tort reform issues many of those years.

We have always responded. But we have at the same time asked questions as to why it is that tort reform is needed. And if the tort reform is accomplished, what will be the result.

And for the most part, we have addressed those issues to the insurance industry, asking them, if we do these things, will this somehow make the insurance more available, or more affordable.

There has never been a positive or an affirmative response from the insurance industry, ever, to any of those questions. And in fact, you can look at the record and see that there has never been any increase in affordability or availability of that insurance.

And so the uniformity issue seems to be kind of a red herring to me. I do not know that uniformity really is going to accomplish much of anything, other than to transfer all of this to the Federal level and take it away from the states. And that is really what we are opposed to.

Judge CARRICO. I do not have a great deal to add, sir. I would say this, though, that the reasons for differences most often, I think, are the result of local conditions. And conditions are not uniform.

And my idea of government is to keep it responsive to the conditions that exist. And those on the local level generally are more aware of those conditions and more responsive to them.

Senator PRESSLER. Well, then, what about forum shopping, where people will move a lawsuit to another jurisdiction?

Judge CARRICO. I submit, sir, that that is inevitable, even under the Federal legislation.

They will find a judge interpreting the statute one way, and another judge interpreting it another. And they will seek to get the case in the court that they think will give it the best interpretation of it.

That is unavoidable, I think. In any law that you enact.

Senator PRESSLER. Would it alleviate it somewhat? Would the forum shopping be alleviated somewhat?

It is true that what we have now are different local conditions. But what happens is that a lawyer will move the case to the jurisdiction that has the highest returns. If we had uniform standards, forum shopping would be alleviated somewhat, would it not?

Judge CARRICO. I think to an extent, sir. But if the conditions in one state which have caused the difference in the rule that is applied is to be responsive to the need.

Then the result ought to be, unless the jury just goes off on a binge, ought to be responsive to the injury.

Senator GORE. I apologize for calling time, even though we have been more liberal in its application earlier.

We have time constraints, though, because I might say to our other witnesses, there was a significant breakthrough on arms control yesterday, and Secretary Shultz is going to be briefing the entire Senate at noon in the Intelligence Committee room. And so we are going to have to move along rather expeditiously.

I would like to thank these two witnesses very much for their testimony. And I would like to call our next panel to the table, the Hon. William Dreier, with the Superior Court of New Jersey, Appellate Division, and the Hon. John Donley, State Senator with the State of Colorado.

Gentlemen, if you would hold your statements to five minutes, we would appreciate it, so we can get to the final panel. And I am going to ask my colleagues to join me in forebearing and not asking too many questions.

We will put your complete statements in the record. And I would like to apologize to you for the time constraints which are imposed by the matter I just discussed. But let us begin with you, Judge Dreier. Please proceed.

STATEMENT OF HON. WILLIAM A. DREIER, JUDGE, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Judge DREIER. Thank you, Senator. First, Senators, my background, unlike my distinguished predecessor here, is not as a Chief Justice of the highest court, but rather as trial judge first for a 10-year period, followed by over four years on our state intermediate appellate court, and I have probably reviewed a thousand records in that time.

In addition, I am on the faculty of the National Judicial College, where I teach judges about product liability law. As such, I have some fair experience as to what a uniform standard would do, whether judges could administer this, and more particularly, whether this will make the system more complicated or actually ease the load on state judges.

Senator GORE. Judge Dreier, if I could interject there. We are happy to have your experience.

I neglected to say that, these two witnesses, both of you are testifying as individuals and not representing any organization.

Judge DREIER. Exactly. And my statement, and I am required by our supreme court to say this, represents my personal views and not my official position, if any case should appear before me or that of any in our court system.

But from the experience that I outlined, I can tell you unequivocally that a system generating a single body of precedents, interpreting the same language at the national level, will greatly ease the burden on the states.

I do not think this has anything to do with a litigation explosion or a tort crisis. We are not attacking that problem here.

What you are attacking is to whether we can have a uniform system of product liability law, which will mean that when a state judge gets a problem, he will be able to decide it the same way, I am not saying always the identical conclusion, but be applying the same standards as the judge in the adjoining state or across the country.

When manufacturers distribute their products, they know that there will be a single set of rules that govern these products across the country. That is what you will be attacking here.

And it will work, I think. As best it can. A uniform law would work. But it has been on the books for years, and the states have not adopted it. The time has come for some overriding action.

Section 402(a) of the restatement, and article 2 of the UCC, both cover this area. Yet, the restatement is not binding, and the law has greatly outgrown the warranty provisions of the Uniform Commercial Code.

We need a Federal standard, since the state legislatures have not adopted the uniform standards. And talking about whether the laws are uniform, I brought with me a chart. This chart was prepared by the Law and Economic Center at the University of Miami.

It outlines the state law of the entire country in the area of product liability. This chart shows as much variance as we have states. There are no two states, apparently, that have the same law.

You go from place to place, there are different rules. A nationally distributed product is subject to just that much varying law. And

the predecessor here seemed to think the law is a lot more uniform, I think, than it actually is.

I come from New Jersey, known as one of the more liberal states. Not more than a month ago, excuse me, maybe a month and a half ago, we enacted a statute which changes areas of our law. But our statute is different from that across our borders. You can do something about that.

I have in my statement, and this is just an addendum, an area of discussion, talking about a single forum adjudication of issues. These are issues in the area of defect. I think there should be a system of Federal defect adjudication, which will be binding, not just on defendants, that has been the major emphasis in the past. But a fair adjudication should also be binding on plaintiffs, so that if there is a single adjudication, the plaintiffs will know if there has been a finding of no responsibility they cannot hit this manufacturer over and over and over again throughout the country. It should cut both ways. I outline it in my statement. I need not go into it here. I will defer now, knowing of your time constraints.

[The statement follows:]

STATEMENT OF HON. WILLIAM A. DREIER, JUDGE, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION [1]

Mr. Chairman and the Honorable Members of this Subcommittee: At the request of this Subcommittee, I am presenting my views concerning how the principles of Federalism might be served or violated by the adoption of national products liability legislation. As the basis of discussion I will use the March 6, 1987 text of S. 666 introduced in the First Session of the 100th Congress, although some references will be made to H.R. 1115, the proposed "Uniform Product Safety Act," now pending in the House. My perspective is that of a trial and appellate judge, having served ten years in the former capacity and four years in the latter. For many years I have been a faculty member of the National Judicial College and have lectured extensively in New Jersey and throughout the country in the field of products liability. When I previously testified before this Subcommittee on March 21, 1985, I provided the Committee with a more complete resume of my background. If the Committee wishes to resubmit any of this material, I would be happy to do so.

In my prior testimony, after a section-by-section analysis of S. 100, I noted:

Generally, I favor not only a bill for a uniform law of products liability, but I feel that this bill, although it requires some tightening and substantive amendments, provides a real chance for such a law to come to fruition. Having seen firsthand the tremendous waste of money and time involved in administering product cases where the law appears uncertain, and having observed attorneys from other jurisdictions attempt to bring cases in New Jersey to take advantage of a favorable position for plaintiff or defendant, I commend your efforts. A manufacturer should know when its product is put on the market what its potential liability might be throughout the country. The vagaries of a product owner's movements should not govern the manufacturer's responsibility. A prudent manufacturer should not be required to retain 50 or more local counsel to define its responsibility.

While the substantive provisions of the proposed bill have been substantially amended since S. 100, my feelings concerning the need for national product liability legislation have not changed. Although in many if not most other areas I personally advocate local legislative control, economic problems that have a direct multi-state impact unquestionably are ripe for federal resolution. This was recognized by the framers of the Constitution in Art. I, Sec. 8, Cl. 3, and in the many decisions since *Gibbons* v. *Ogden*, decided by Justice Marshall in 1824. One need not enter the current strict construction debate to say the regulation of responsibility for nationally distributed products is a proper subject for Congressional action.

I have endeavored in this statement to outline areas where I see matters uniquely suited to federal regulation, since no single state can have a significant impact. It is,

[1] My opinions contained herein are my personal views. They should in no way be considered my official position or that of the New Jersey Courts.

of course, possible that a uniform act could achieve the same result. This was, however, attempted in 1978, but the Uniform Product Liability Law, published in 1979, has languished with no state adopting the model Act in full.

The threshold question faced by this Subcommittee and the Congress is how much control over the products liability field should be assumed by Congress. Senate bill S. 44, proposed in 1983, and the current H.R. 1115 in effect preempt the entire field of products liability, superseding the Uniform Commercial Code and all state regulation. Each successive Senate bill has required less federal preemption leaving more control to the states. S. 666 like its predecessor S. 2760, does not affect commercial losses, and does not change any state and federal environmental claims legislation or common law. But it also omits numerous substantive issues in the personal injury area; the bill leaves these matters to existing and varying state and federal law. I suggest this, as explained later, is a mistake. The administration of the new statutory claims is properly left with the State courts unless there is diversity jurisdiction. In short, S. 666 scrupulously recognizes a joint state and federal responsibility in the area of products liability regulation.

The purpose of products liability, whether founded on a theory of negligence, strict liability or warranty, is to permit the shifting of cost from the injured plaintiff to the manufacturer who in turn, either through insurance or as a self-insurer, spreads the costs of these injuries to all of the users of the product by a small incremental increase in price. The beneficent aims of this theory have been thwarted, however, by problems with the delivery system. In particular, the costs of plaintiffs' attorneys' fees and expenses, defense counsels' fees and expenses and internal insurance company costs have left claimants inadequately compensated, while manufacturers are forced to spread among the users of their products expenses which are far greater than those necessary to recompense victims. This problem is now the subject of two ongoing studies by the American Law Institute, one covering complex litigation generally and the other product liability actions specifically. This is a national problem and one well suited to legislative resolution.

Title II of S. 666, "Expedited Product Liability Settlements," provides a first step in attacking this problem. Attorneys historically have underutilized the offer of judgment rule of the federal courts. This proposed expanded offer of judgment rule may find greater acceptance if it is imposed by every state court in products liability matters. With proper deference to the burgeoning state exploration of alternative dispute resolution procedures, section 202 of this bill encourages claimants and defendants to resort to those state procedures in an effort to short-circuit the expense of full-blown litigation. I do not prejudge the results of these efforts which might well alleviate the problem. I feel, however, that until the preparation and adjudication process on both the plaintiffs' and defendants' sides is analyzed and overhauled, and the uncertainty as to the state of the substantive law is removed, excessive costs will continue.

The present mode of resolution—litigation as opposed to arbitration—is not the principal villain. I believe that a significant part of the problem is the present necessity for repetitive marshalling of proof of product defects, and the concomitant need to defend against substantially similar suits throughout the country, often resulting in successive and conflicting resolutions of similar if not identical claims of defect. There is, unfortunately, no uniform national system of offensive or defensive collateral estoppel in a generally respected and regulated forum which might alleviate the problem. This could be a matter for future exploration.

I suggest as a concept that if a particular product has been deemed defective after a fully litigated case in a federal forum, the only issues remaining in that case or in any other case involving the product should be causation and damages. A finding of freedom from defect would preclude further claims. The cost of investigation, expert reports, attorneys' fees, depositions, court costs and the myriad of other expenses in re-proving the same defect is a problem that could be addressed by Congress. A small first step in this area is suggested by § 206(b) of H.R. 1115, where compliance with federal standards is deemed a defense against a design defect or failure to warn claims. I also note the punitive damage defense for federally-approved drugs and aircraft in § 208(c) of H.R. 1115 and incorporated in recent New Jersey legislation.

I appreciate that individual questions of causation and local standards of damages require deference to the states in administering other aspects of product claim on a case-by-case basis. I would not want to see a casual adjudication in a local court having broad estoppel effect. Yet the federal government could provide a forum for adjudicating many questions of defect with a resulting substantial reduction in the overall cost of proof. Thereafter, potential plaintiffs and the defendant might be

deemed estopped from relitigating the "defect" issue, leaving the causation and damages issues for local resolution.

An area not approached sufficiently in this legislation is the lack of uniformity of substantive rules of product liability among the states. While S. 666 and its predecessors attack some of these problems, products liability law is so varied throughout the United States that insurers covering nationally distributed products must of necessity focus upon the more liberal jurisdictions. With the exception of unanticipated or casual use of the product in such jurisdictions (see *World-wide Volkswagon Corp.* v. *Woodson,* 444 *U.S.* 286 (1980)), a carrier must protect itself from its greatest potential liability. The Law and Economics Center of The University of Miami has prepared a chart entitled "Products Liability at a Glance—1987," which analyzes fifteen separate categories of products liability law, many with subparts, for the 50 states and the District of Columbia. The variety is disheartening if our aim is uniformity of responsibility so that underwriters may set reasonable premiums.

I have avoided discussing the specific substantive areas which could be covered in a more comprehensive bill. I am pleased to note that in both the Senate and House bills the statutes of limitations and repose, the discovery rule and a limitation on a seller's responsibility have been retained, since disparate state rules in these areas engender forum-shopping, and prevent accurate insurance rating. Similarly, the workers' compensation provision, the several liability provision, and the alcohol defense also serve the same ends. While I may not agree with the proposed federal resolution of each issue, the considered decision of Congress resulting in uniformity should be welcomed. You might well consider additional federal standards in areas such as the state-of-the-art defense, alternative responsibility, and other substantive issues if they can be included in a bill with bipartisan support. Less diversity in the law would effect easier administration.

It may be claimed that congressional action would unduly preempt the growth of state common law and would create a complex body of federal law. This argument overlooks the fact that legislatures in over 30 states have already passed some type of products liability legislation, with few similarities. Thus state courts are already faced with restrictions on the free development of the common law, and in statutory interpretation are denied a common basis for out-of-state precedents.

I have also heard it suggested that it would be difficult for a state judge to administer substantive federal products liability standards. I also disagree with this proposition. Federal standards in § 1983 actions are regularly administered by state judges without significant problems. The Magnuson-Moss Warranty Act, an example of consumer protection legislation, is interpreted and applied in state courts, as are numerous other federal statutes.

The real problem is where a state has no precedent and a trial judge is forced to examine varying out-of-state rules covering the subject. As a faculty member for the National Judicial College, I have taught this area of the law to hundreds of judges, explaining majority, minority and variant rules in nearly every aspect of products liability law. It would decrease the state judge's workload and make our lives easier, not harder, if there was a single standard in each area. In addition, a national body of meaningful precedents would be created, with the Supreme Court as the single final arbiter if disparity arises. Such a system would not be perfect, but certainly would be better than that which we have now.

The real beneficiary of such a unified system is the public. The manufacturer, seller, insurer and consumer all are now faced with disparate, arcane, or the absence of state rules governing products liability. You have a chance to remedy this situation. More certainty in the law should have its usual effect—reduction in the volume of litigation.

In conclusion, I see some fair balancing of state and federal interests in S. 666 and an express recognition of the respective roles of both levels of government. But there is still room for improvement. I thank you for the opportunity to present my views before this Subcommittee, and I respectfully stand ready to answer any questions that the Committee or any staff member may have.

Senator GORE. Thank you very much for your courtesy and your statement. Senator Donley?

STATEMENT OF JOHN P. DONLEY, COLORADO STATE SENATOR

Senator DONLEY. Mr. Chairman, Members of the committee, I would ask that my statement be entered in the record. I will para-

phrase it and try to get to the three things that I have heard so far in the testimony.

I respectfully wish to disagree with the prior two witnesses. There is a role for the Federal Government in the area of product liability. The states have addressed a number of issues. But they are small issues. They are things we can address.

So long as the Federal Government has seen fit to regulate labeling, engineering safety, and a number of other areas, and they have preempted the states from having any part in those aspects of product liability, the Federal government has to come in at the end and provide some assistance for the other part of the problem in those three things.

The fault issue, joint and several issue, and the punitive issue. The Federal courts triggered much of the abandonment of the concept of fault. And only the Federal Congress can deal with the Federal courts. The states have no ability to impact what those Federal courts can do.

The joint and several issue, that is a uniformity issue. If an individual in Tennessee or an individual in Wisconsin has a product liability issue, he is certainly entitled to have the law applied uniformly to him as to how much he is going to have to pay, based on his degree of fault.

The punitive issue, punitives really are not part of the tort problem because in the commercial insurance, there has never been insurance for punitives. So the punitive part in tort reform is a side issue.

But you certainly do have an opportunity to make a contribution at the Federal level, because there are things that we at the state level cannot do. And I speak from experience as an individual who participated in massive tort reform in the State of Colorado.

I think you can, you should, you should pursue those areas in that narrow range of activities where you do have an opportunity to have an impact. Thank you.

[The statement follows:]

STATEMENT OF JOHN P. DONLEY, COLORADO STATE SENATOR

Mr. Chairman and respected members of the committee, I am John Donley. I appear before you today as a member of the Colorado Senate, but more importantly, I believe I respresent and speak for many of my colleagues in other states.

When I state that a preemption of state legislation is necessary, I don't do so easily. I have, for many years now, been a staunch supporter of federalism and state rights. I believe that the Congress should defend our shores and make postage stamps—and I am not even sure about the stamps. However, I am sure of the fact that national laws are needed to put a lid on the surging problem of unreasonable product liability suits.

In the past few years, courts have effected many changes in the laws governing liability for injuries. Many of these changes have expanded the bases on which manufacturers and product sellers can be found liable. Perhaps the most troubling of all these changes is the finding of liability for products that function as they are intended to function. Courts are now finding liability for these products simply because their use inherently involves risk regardless of the fact that this risk is evident to reasonable people.

Public knowledge of litigation abuse is widespread. Due to court interpretations and lack of legislative guidance, settlements are exceptionally high and unreasonable. Public perception of liberal court awards only adds flame to the fire. When people read of such abuses as *Columbo* v. *Transworld Inernational* what guidelines will they follow if they should happen to go to trial? In this case a 41 year old champion body builder strapped a refrigerator to his back and ran in a foot race. One of

the straps slipped and he was injured. He sued the strap manufacturer and won $1 million in damages. Such awards are ludicrous abuses of justice and fairness.

The natural course of business is being disrupted by the threat of litigation. We all know how important it is for U.S. business to compete effectively in the marketplace. What is at stake is the health of the economy and the security of jobs for our workers. For example, in May of 1986, Cessna Aircraft Co. laid off 900 employees and halted production of its piston aircraft when liability premiums became the largest component of their product's cost. For major general aviation manufacturers, employment is done 66 percent since 1980 and a good part of the cause is due to current trends in product liability.

We have witnessed a steady decline in the production and the supply of consumer goods, for example, sporting equipment. What of our youngsters involved in athletics. Are they really better served when product liability laws reduce the availability of sporting equipment. How is it in the public good to drive ten of twelve manufacturers of football helmets out of business by extraordinary insurance premiums caused by our unpredictable product liability system? Do we really want to drive out the remaining two manufacturers and rely instead on foreign companies for our althletic equipment?

Our economic competitiveness is threatened when prices for products rise, and when there are disincentives for companies to market new technologies. What of the industrial engineer who finds a better design or the doctor who finds the possible cure to a terrible disease—they may not market their design for fear of litigation.

Recently, Unison Industries scrapped a year's worth of marketing and engineering research on a totally new electronic ignition product. The product would have significantly improved the performance and reduced the maintenance expense on today's piston aircraft engines. Unison decided not to market their design due to concern with potential product liability. As the President of Unison Industries testified before the House Subcommittee on Transportation, Aviation and Materials: "We were afraid of becoming a technological pioneer and potentially subjecting ourselves to some plaintiff's attorney second guessing our decisions in a lawsuit."

Manufacturers of pharmaceuticals face similar liability threats when attempting to find a cure for AIDS. What company will test a possible cure only to be sued for unpredictable side effects?

Today's tort system and product liability laws are totally out of control and are damaging the consumers they should be protecting. We are all paying higher prices for products due to lack of uniformity in product liability law. We are all suffering from the lack of new products denied us by an unpredictable civil justice system. The cost of product liability insurance that manufacturers must carry—which has risen dramatically as a result of the current system—is also ultimately passed along to the consumer. For example, consumers pay an 18 percent tax on every stepladder that they buy. The tax goes to the producer in the event a suit is filed against them because someone misused a ladder.

State legislators are not attempting to shun their duty when it comes to resolving the problems of the tort system. Within the last two years, we have produced solid tort reforms in over thirty-five states. This is no small feat when one considers that there are over twenty different provisions that could be reviewed for one bill. Even the states which have secured product liability reform, msot notably New Jersey, face the possibility of strained judicial interpretations or charges of unconstitutionality.

Florida is a perfect example of the courts retroactive style. In April of 1987, the Florida legislature passed a law which provided a $450,000 cap on non-economic damages. Shortly thereafter the Florida Supreme Court ruled the law as unconstitutional. Case law is an attempt to undo legislative intentions. With this ever present threat, benefits of reform will never come to fruition. Consumers will continue to pay a product liability tax as insurance companies will not be able to afford to lower their rates with a judicial threat always looming overhead.

Federal legislation on product liability is needed to end the confusion created by conflicting product liability rules in the states.

Currently, in lawsuits involving injury from a faulty product, the law that applies is the law from the state in which the injury occurred. For injured consumers in states with weak product liability laws, recovery may be unjust and slow coming. In contrast, injured parties in states with strong legislative Acts may find it much easier to obtain legal remedy. In fact, in today's system, two people living in different states who are injured by the very same product may be awarded different judgments or, in some instances, one victim may be totally barred from suing at all.

To correct inequalities, abuses and expenses associated with the current system, I call upon the U.S. Congress for uniform and fair standards in product liability laws.

The current legal morass is creating a product liability insurance crisis, driving companies out of business, stifling the production of new and better products and logjamming the courts. A federal law will bring stability and fairness to product liability law and will help reduce legal costs. With a uniform national law, manufacturers will know the standards that their products must meet and will have greater incentive to design safe products. Consumers will know their legal rights and the courts will have uniform legal rules to apply in all product liability cases.

Judge DREIER. Senator Gore, if I may just add to something that I said. I know my time was not up before.

I wish to address something that the Chief Justice had said before, and Senator Danforth asked about. It involves issues that come into a case but are governed by Federal law, when these are already issues in a case governed by state law.

We do this every day. I cannot believe that a person sitting on an appellate court and reviewing records can believe that a state judge cannot do that, or does not do it regularly.

Senator GORE. Does it impose problems for a jury?

Judge DREIER. Not really. We now give a charge to a jury on a Section 1983 claim, in a case where there is a federal civil rights claim, which is combined with an assault and battery or other claim under state law.

You do not tell the jurors that Federal Congressional action gave rise to this portion of the plaintiff's case and other law gave rise to other parts of his claim. You merely describe the law to them. If you need elements A, B, and C, the plaintiff has proved them, he recovers. You prove D, E, and F, he can recover under a different theory. And you give the elements to them, you give them an outline of what they can do.

The source of the law is not the issue. There may be a number of issues in the case. And if one of the claims is Federal, such as if one of them is a Magnuson-Moss claim in a product liability case, the fact that the genesis of other claims was state action, as opposed to Federal action, makes little if any difference.

I would not, and you should not, fear about proceeding in this area. It will not be a problem.

Senator GORE. Well, thanks very much. We may have questions in writing for the record, if that is all right with my colleagues.

I did want to note that you made a statement, Senator Donley, on punitive damages not being covered by insurance.

I think that may vary from state to state. And in any event, we may have an interchange in writing on that.

Senator KASTEN. I would like to just ask Judge Dreier to spend 30 seconds or so on this idea that you were talking about in terms of the Uniform Commercial Code and the warranty section. At one point we did not have contract uniformity. We developed a Uniform Commercial Code because a contract written in Wisconsin had to be upheld in Hawaii and in California and in Florida and whatever.

Now, there are certain parts of that Uniform Commercial Code that have really been stretched too far. But, the point is that we cannot cover the problems of warranties, the problems of liability without uniformity. We need a uniform product liability law.

At one point railroads were individual, state by state. We ended up with the ICC. You are nodding, so you agree with what I am saying.

But this is something that is evolving, and now the time has come for uniformity on product liability.

Judge DREIER. Senator Kasten, it even goes beyond that. Uniform act is something that is given to the states, uniform law commissioners present it to the states for adoption.

The Uniform Commercial Code has been adopted in every jurisdiction, with some variants in some jurisdictions. But generally has been adopted throughout the country. We have a uniform product liability act, but it has not been adopted.

The portion of the restatement, which is a uniform situation, most of section 402(a) is adopted by most states. But there is such variance because there is no single arbiter.

The fact that the supreme court of New Jersey and the supreme court of Virginia, or Idaho or California, might decide things differently leaves it in that area where it affects consumers, it affects insurers, it affects manufacturers and sellers.

If we have a national act, that will not happen anymore. If there is that sort of diversity, at some point the Supreme Court will take the issue, and the United States Supreme Court will settle it.

We no longer will have diversity. It will give us an opportunity to go beyond what the UCC does, beyond what section 402(a) does of the restatement, and give us a really workable national standard that can be administered by our state courts.

Senator KASTEN. Judge Dreier, thank you.

Senator GORE. Thank you both very much for your statements and your understanding of our time constraints. Thank you.

Even more understanding will be required from the next panel. If they would come forward, I would appreciate it. Mr. Gene Kimmelman, legislative director of the Consumer Federation of America; Jonathan Reynolds, general counsel with Cosco, Inc.; Marshall Shapo of Northwestern University School of Law; and Victor Schwartz, representing the Product Liability Alliance.

Thank you all for coming. We will, as with prior panels, put your prepared statements in the record, without objection, and ask you to brutally summarize your thoughts, if at all possible, and we will begin with you, Mr. Kimmelman.

STATEMENT OF GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. KIMMELMAN. Thank you, Mr. Chairman, Senator Kasten. Once again, we appreciate this opportunity to appear before you today on product liability.

We have heard a lot of the same arguments this morning that we heard in the past. I do not intend to repeat the arguments that you have heard from the Consumer Federation.

Instead I would like to address an area of concern to us where we think we finally have some facts, that we are submitting for the record, that have been omitted from this debate on product liability.

We have heard about all the problems in the system in the past, we have heard about them again this morning. There is no question that there are some problems.

We have talked in the past about safety incentives created by product liability law. We never had any systematic evidence of precisely how those safety incentives work.

Well, this morning we are submitting a report that was done by Dr. Mark Cooper, our research director, who is on my right, which tries to quantify some of the benefits that our product liability system has provided to the American public in the recent past.

Let me explain what we have tried to do in this study. It is quite simple. We first went to corporations to find out what they have done. Product liability law has changed, strict liability has swept the land. What was the reaction of corporate America to that?

Well, the reaction is quite evident from survey results. Before 1971, only about a third of large corporations surveyed had a product safety function, a major concern about product safety in their functional organizational structure.

But as strict product liability swept the land, by 1978 we see a dramatic change. We see that over 90 percent of these large corporations have established and implemented a structural product safety system in their organizations.

And since then, the situation gets even better. More detailed surveying in 1986 indicates that in response to product liability, corporations have done some very important things.

High on their own list, in response to questions, is the fact that they have improved product labeling for the American people. Also high on their list is the fact that they have improved safety design.

And just about as high on the list is the fact that they have changed manufacturing procedures and operations in response to product liability.

Clearly, safety and quality have become much more important to corporate America in the last 20 years, and product liability has quite a bit to do with that.

Next, we looked to see if American consumers have perceived any of these changes. And the answer there is again quite clear. In opinion survey after opinion survey over the last 10 years, we see rising consumer satisfaction with product performance, both quality and safety.

So there is a match between corporate actions in response to strict product liability, and consumer perception of the products they are receiving.

Finally, we tried to analyze the changes that have taken place in accident rates in our society during the last 15 years, and compare them to the immediate post-war period, evaluating this with an econometric model to see what the trend has been in terms of the rise and expansion of strict liability and accident rates.

Controlling for other factors that could influence this, like population growth, change in consumption patterns, and normal wear and tear of products, we came to what we believe is a startling conclusion.

The spread of strict product liability in conjunction with actions of Congress to create safety agencies and public pressure for better, safer products has helped reduce the number of accidental deaths in this country by between 6,000 and 7,500 per year. It has helped avoid up to three million injuries per year.

Now, although we cannot quantify these benefits in the same way as many have tried to quantify the costs of the system—in dollars and cents—clearly the benefits of preserving 6,000 to 7,500 lives a year, and avoiding up to three million accidents, is not insubstantial.

This, of course, does not mean that we believe our system is perfect. Far from it. We urge this committee to continue to look for ways to help speed up litigation, to get as many disputes as possible resolved out of the courtroom, and to add more fairness to the compensation goal of our product liability system.

But we also believe that the benefits of state law adoption of strict liability must be preserved to continue providing American consumers better and safer products. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

The Consumer Federation of America [1] appreciates this opportunity to testify on the importance of state product liability law to recent improvements in product safety. Our research director, Dr. Mark Cooper, has just completed a report, submitted along with this statement, which shows that the evolution of strict liability in conjunction with the creation of federal safety agencies and social pressure for product safety saves thousands of lives and prevents millions of injuries each year.

STATE PRODUCT LIABILITY LAW: FAIRNESS AND SAFETY

A system which maximizes market incentives that promote safety is both the most humane and the most efficient. Accident prevention not only spares consumers needless injury and death, but is by far the cheaper way to deal with injury than after-the-fact cost re-distribution. The legal standard that is used to determine where responsibility lies when accidents do occur must not only produce a fair result and permit efficient dispute-resolution, but it most also spawn incentives for greater safety in the future.

State product liability law has evolved to meet these goals. Over time, courts noted that by placing goods on the market, the maker represents to the public that these products are suitable and safe for use. Simultaneously, courts confronted the shift in our economy from a system of small-scale production—its personal relationships dominating the interaction among workers, managers, sellers and customers—to an impersonal, highly mechanized, mass production and distribution system. State courts continually refined liability rules to reflect the policy, articulated by the California Supreme Court in *Greenman* v. *Yuba Power Products*, 59 Cal. 2d 57, 63 (1963), to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves."

THE SYSTEM WORKS

Consumers' commitment to state product liability law as a vital agent for safety-promotion reflects one simple fact: it works. In Designing Safer Products: Corporate Responses to Product Liability Law and Regulation (1983), the Rand Corporation's Institute for Civil Justice concluded: "Growing corporate awareness of product liability issues spurred in several instances by suits that resulted in substantial individual judgments against firms increased the willingness of these organizations to establish formal product safety activities." The Rand study went on to find that of all the various external social pressures on corporate decision-making, product liability has the greatest influence on the safety design of products.

Dr. Cooper's report, tracks fundamental changes in social, political, and legal attitudes toward product safety and quality that took place in the late 1960's and 1970's, and then presents an econometric analysis to evaluate the impact these changes had on accidental deaths and injuries. Dr. Cooper found that by 1984, there

[1] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizens, labor, farm cooperative and rural organizations which together represent more than 30 million people.

were between 6,000 and 7,500 fewer accidental deaths and as many as 3 million fewer injuries per year as a result of the adoption of strict liability, creation of federal safety agencies and social pressure for product safety. We believe it is time these positive attributes of state product liability law enter the federal debate over problems in our civil justice system.

THE PROBLEM OF COMPENSATION DELAYED OR DENIED

The problem with our product liability system is not the legal standards formulated and applied by the states courts. Rather, the problem is the numerous obstacles injured victims must face in their efforts to secure compensation from those who caused their injuries.

True product liability reform must come to grips with the barriers to victim's recovery. If action is to be taken in this area, the Subcommittee should consider the following proposals: (1) a system of alternative dispute resolution that would create incentives for manufacturers to settle claims quickly; (2) and economically efficient method for resolving the so-called smaller claims of victims who could not otherwise obtain counsel; (3) measures that penalize efforts to disregard public safety, delay litigation or frustrate discovery of evidence; and (4) rationalization of the procedural and evidentiary rules applied to toxic cases.

CONCLUSION

State product liability law is of paramount importance to American consumers. Product liability is the strongest line of defense we have against unsafe products and the financial hardships that are created when unsafe products cause injury. The recent history of the consumer marketplace demonstrates that state product liability law has promoted significant improvements in product quality and safety. For these reasons, we urge the Subcommittee to turn its back on measures that would distort the fairness and safety-enhancing choices made by state product liability law and, instead, examine new ways to perfect the compensation and safety-promoting role of the product liability system.

Senator GORE. Thank you very much.

We want to acknowledge the presence of Dr. Mark Cooper, who prepared the report you discussed.

Our second witness is Jonathan Reynolds, general counsel with Cosco, Incorporated. Mr. Reynolds, welcome. Please proceed.

STATEMENT OF JONATHAN REYNOLDS, COUNSEL, COSCO, INC.

Mr. REYNOLDS. Thank you, Mr. Chairman.

Very briefly, I work for Cosco, Inc. of Columbus, Indiana, a manufacturer of household goods and child car seats, which is the crux of our liability problem.

Senator Gore, I believe, is probably very familiar with Tennessee's role in child car seat development and the mandating of use of these products in all states at this time.

We face a critical product liability problem. We are not a big company. We employ about 1,000 people. We are not one of the 230-some odd companies, large corporations, that were surveyed concerning the product liability crisis. If I had gotten that survey, my answers would have been significantly different than what apparently were the result of this survey.

We have a significant problem. Everyone in our industry has a significant problem. The number of manufacturers of child car seats dropped from twelve to nine during 1986, during a period when all states mandate use of these products in all situations for young children.

The core of our problem comes with misuse. When child car seats are used properly, DOT has determined that they are 70 percent effective in reducing or eliminating serious injury and death to children in auto accidents.

When the product is not, however, used in accordance with the instructions a significant reduction in the effectiveness of the car seat in an accident occurs. With joint and several liability and the lack of any effective, uniform misuse defense throughout the various states, we just cannot justify the risk of going to trial in a case with potential seven figure damages, where one percent or five percent liability on the part of Cosco is going to result in a verdict against us for the full amount of the damages.

That is the way the law is in every state right now, subject to certain qualifications such as Proposition 51 in California and some other state "reforms," which I consider no more than band-aid approaches to the problem around the country.

In my written testimony for the record, I go into at length specific tort reforms we are seeking. But at the very least, joint and several liability has to be reform on a national basis.

There is incredible diversity of law. California does not follow 402A of the Restatement of Torts. There is no requirement in California, where I practiced privately for eight years in defending product liability and personal injury cases, that a product be found unreasonably dangerous, which is a requirement in 402A.

That is a significant distinction in the largest state in the country and one which I think probably leads the country in product liability cases and the size of the verdicts that result from those cases.

There really is no effective misuse defense because that issue is intertwined with joint and several liability. We have to prove 100 percent misuse as the proximate cause of the injury in order to walk out of a courtroom. Ninety-nine percent will not do it.

That one percent will stick the manufacturer with the entire verdict, and that is the thing that forces us in cases of injured children who generate an incredible amount of sympathy before a jury—and understandably so—to settle cases that we really think are defensible or where our degree of fault is really very marginal.

We feel that Federal action is the only way to get the necessary uniformity in the law, to provide needed relief to manufacturers, large and small, around the country.

Thank you for your time. If you have any questions, I would be happy to answer them.

[The statement follows:]

STATEMENT OF JONATHAN REYNOLDS, CORPORATE ATTORNEY, COSCO

I am Jonathan Reynolds, Corporate Attorney for Cosco. Cosco is a 50 year old company that manufactures housewares and juvenile products. Prior to coming to Cosco, I was a partner in Russ and Reynolds, a San Francisco law firm involved primarily in the defense of product liability and personal injury cases.

Our emphasis today will be on child car seats, our company's most serious product liability problem. This is a critical issue for Cosco. Quite honestly, the very existence of our company and our jobs are on the line. John Moeller, our Chairman, could not be with us due to a prior business commitment. He is vitally interested in tort reform and is currrently serving as the Chairman of the Coalition for Uniform Product Liability Law, one of major tort reform coalitions in the country.

We seek justice, no more and no less. Like all Americans, we have learned quickly to sense when we are being "ripped off." We are simply not being treated justly by our present tort system. Jobs, companies, products and even tax revenues could ultimately be lost if these injustices are not corrected. The future development, and possibly the availability of affordable domestically produced child car seats are at stake. In the current environment, valuable resources and effort that should be

going into the development of this product are being diverted into defending lawsuits.

Child car seats are widely recognized as being very effective in saving lives and preventing injuries. They are mandated for use in all 50 states and the District of Columbia and are credited with saving hundreds of lives and thousands of serious injuries annually. Chuck Hurley, Executive Director of the National Safety Council, has described them as "performing beyond all expectations." Department of Transportation studies also support the conclusion that child car seats are highly effective when used properly.

Child car seats have been designed, tested and manufactured to a standard issued and enforced by the U.S. Department of Transportation since 1968. The current standard, which was implemented in 1980 requires sophisticated dynamic testing. It was developed over an eight year period through the joint efforts of the U.S. Department of Transportation, the University of Michigan and Cornell and other universities, numerous consumer safety groups, the medical community, academics, testing laboratories, and the child care seat manufacturers.

The current standard encompasses not only major construction specifications, such as certain key materials and dimensions but also establishes performance criteria that the seats must meet when dynamically sled tested in simulated frontal crashes. It is a "living" standard. It is being closely monitored and has been amended several times since it was adopted.

Over the years, in addition to meeting this standard the manufacturers have worked very hard to improve upon their basic designs to make the products easier to use and to discourage misuse.

Unfortunately, misuse of child car seats is a major problem. U.S. Department of Transportation studies show that a great many child car seats are not being used properly and that very often the misuse is intentional despite manufacturers instructions and warnings. For example, 70 percent of those who faced infants improperly forward and 95 percent of those who did not use the harness properly did so knowingly. The manufacturers, in addition to making their products easier to properly use have been working with the American Academy of Pediatrics, the National Passenger Safety Association, the National Safety Council, other safety groups, and the National Highway Traffic Safety Administration to combat consumer misuse.

While child car seats are performing very effectively in the real world when used properly, they cannot save every life nor can they prevent every injury, and that is the hub of the problem.

Product liability is an enormous problem for the manufacturers. During 1986, the number of child car seat manufacturers decreased from twelve to nine. All of the companies who have made child car seats for a period of time are being sued for amounts exceeding the net worth of their companies or divisions. The manufacturers are not able to purchase adequate insurance coverage and many are uninsured for most claims. The viability of this industry is genuinely threatened, and ultimately the availability and affordability of this needed product is at risk.

It is wrong to assume that these products are inherently ineffective. When compared with the millions of seats sold each year and the hundreds of thousands that are in accidents, only a relative handful of claims are made, and almost all of these involve products that have been misused. These relatively few claims, however, because of the seriousness of injuries and the current tort environment, threaten the viability of this small but vital industry.

Unfortunately when confronted with product liability suits the child car seat manufacturers believe they have little choice but to settle out of court rather than attempt to take the case to a jury under the current tort environment. There are many reasons for this.

First, it is common knowledge among experienced trial attorneys that juries want to find in favor of injured children who are themselves faultless. It is also common knowledge that juries tend to view manufacturers as "rich" and very able to pay.

Second, in almost every case, the driver or drivers who caused the accident and the parents or caretakers who may have misused the child car seat do not have adequate insurance coverage. The child car seat manufacturer is often the only "deep pocket" defendant, who under joint and several liability rules, may be required to pay all damages if found as little as 1% liable for the injury. There is no true balancing of comparative fault. This has caused my company to settle suits where we truly believed we were not at fault.

Third, the pendulum has swung so far in favor of the plaintiff in the courtroom that manufacturers usually only risk a jury decision in cases where a defense verdict is virtually certain or the plaintiff's demand for settlement is grossly excessive.

Under the current tort system, the manufacturer has virtually no practical defenses:

Meeting government standards is not a defense regardless of how effective or how much in the public interest those standards are.

In reality misuse is normally not a practical defense. It is only viable where the misuser has a signifcant amount of insurance or personal assets, or can be proven 100% at fault. Further, 20/20 hindsight unfairly extends the manufacturers responsibility for the "foreseeable" consequences resulting from a product's use. This places on the manufacturer an unreasonable responsibility for all of the attendant hazards of every accident no matter how unusual or severe, and for almost any misuse no matter how unusual or reckless.

State-of-the-art defense is often not a practical defense. State laws vary greatly. From the viewpoint of a nationwide marketer, it is only a truly solid defense where it is impossible to technically design and manufacture a better product, regardless of cost and market price.

Fourth, the entire judicial system is geared toward forcing settlements which has resulted in expanded pre-trial discovery and increased litigation costs. Costs of defense are massive. The child car seat manufacturer can now expect to spend $200,000 to $300,000 in the defense of a major case.

Fifth, the pressure on the defendant to settle is enormous. "Surely you will settle for the cost of defense" is heard repeatedly from judges. I have personally heard this admonition in countless cases I have defended. When presented with the option of spending large amounts of money to further defend the case, coupled with the very real possibility of a large verdict, most manufacturers and insurance companies reluctantly accept settlement.

The net result is to force the child car seat manufacturers into settling suits in which the manufacturer's product was truly not responsible for the injuries. This is an intolerable situation and cannot long endure.

What tort reforms are needed? From the perspective of the child car seat manufacturer we offer the following:

First, establish a fair system of comparative fault that assesses the contribution of each actor in a situation, including persons who have acted on behalf of the plaintiff, with damages assessed only according to degree of fault. Joint and several liability should be abolished. At a minimum, joint liability should be eliminated for those found to be at fault to only a relatively small degree. We recommend a 25% threshhold of fault before imposing joint and several liability on any party.

Second, provide a strong misuse defense under which a defendant would not be liable if the product has been altered or modified, or if the product has been used in violation of, or contrary to, the manufacturer's express written instructions and warnings.

Third, the clarity of instructions and warnings should be judged on the basis of reasonableness, i.e. are the instructions and warnings clear to an ordinarily prudent person exercising reasonable care in the use of the product.

Fourth, a government standards defense, granting immunity from suit based on design defect providing the child car seat meets FMVSS 213, should be implemented. FMVSS 213 has proven to be a very effective standard in the real world. It is our impression that the child car seat manufacturers would support the concept of pre-market testing if necessary.

Finally, trials must be conducted on a bifurcated basis. Payments from collateral sources should reduce judgments, and all settlements and judgments should provide for periodic payments of future damages.

VALUABLE RESOURCES

We know of no other product, with the possible exception of vaccines, that has such a direct impact on the health and safety of our nation's children, yet faces such enormous liability risks. The experience and expertise of these manufacturers represent a valuable national resource that the country cannot afford to dissipate. The tort reforms outlined above are fair and just. Time for their implementation is long past due.

Senator GORE. Marshall Shapo with the Northwestern University School of Law. Please proceed.

STATEMENT OF MARSHALL S. SHAPO, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. SHAPO. Yes, Mr. Chairman.

What has been said here already makes me want to give about 20 hours of torts lectures. Maybe if you will give me a minute to be patriotic, I will waive the rest of it. The minute, if you will indulge me, is that as I was walking around Capitol Hill last night it came to me that when I was a law student I was received in the White House by a former teacher who was a presidential aide; that as a law teacher I have recommended students as clerks to Federal judges; and that I have testified in this room on several occasions.

This means a lot to me in this bicentennial week, that these things could happen to the grandson of Russian and Lithuanian immigrants, one grandfather who was a rabbi in congregations all over America and another who was a Philadelphia produce merchant. These things speak to me of the openness and the freedom of this political society.

If I could say one substantive thing to you which summarizes some things I have said at this table before, it would be that your place is with Secretary Shultz, it is not with state tort doctrine.

[The statement follows:]

STATEMENT OF MARSHALL S. SHAPO

Mr. Chairman, I am Marshall S. Shapo. I am a professor at Northwestern University School of Law in Chicago. I am solely representing my own views. I was the co-author of the first published teaching materials on products liability in 1970, as well as the author in 1980 of another such book. Last summer my treatise on the subject appeared. On that occasion, I reflected that when I entered law school in 1961, there was no articulated doctrine of "strict products liability," but that one of the leading student texts employed the history of negligence doctrine as a model of common law judicial development. I received my law degree in 1964 development under the "strict liability" theory that has contributed quite a lot to the modern law of "products liability." Shortly thereafter I began a study of the subject that has gone on for twenty years.

That study will continue whether Congress does or does not legislate on the subject. It might well become more profitable for me financially if Congress does legislate. But I am here to venture some critical judgments about proposed legislation as well as some predictions. Let me begin with a judgment: I believe that despite the controversy surrounding this body of law, the courts have acted rationally and responsibly in developing it. Many particular judicial decisions are subject to the fiercest kind of argument. But on the whole the courts have behaved sensibly, and they have been subject to the damage control that is inherent in a federal system.

Now I want to make two alternative predictions. First, if the courts are permitted to continue developing this branch of the law, they will do so responsibly and sensibly. Courts do read the election returns, and they do read the law journals. The New Jersey Supreme Court, one of the leaders in the development of strict liability theory, made this very clear in the brief couple of years of history that included, first, the *Beshada* decision and then the more limited view of strict liability in the *Feldman* case. There doubtless will be many bumps along the road, and some sellers will sustain liability judgments that are uncomfortable and occasionally ruinous. But as an overall matter, the restraints of the law will keep judicial results in bounds.

My second prediction is that if Congress legislates broadly in this field, it is likely to have several unfortunate results:

(1) It will create new litigation over the interpretation of the statute.

(2) It will strangle state experimentation, both legislative and judicial, in an area which seems ready made for using the states as what Justice Brandeis called "laboratories" for trying out new ideas in the law.

(3) It will have results that are substantively unjust in at least two ways: It will deny tort recoveries to plaintiffs who in justice should have them, and it will tend to lead to the production and sale of more unreasonably hazardous products.

I recognize that in any area of the law so controversial, there will be perceived injustice either way that cases come out, or that legislation proceeds. I have certainly read—and heard, in this very room—sympathetic and moving stories of reputable manufacturers who have had to modify, or even to give up, going businesses because of what they perceived as the results of products liability law. The question is, which is the path of most justice, and least unfairness.

I ought to say that I do not think it is very helpful to deal with this problem on the basis of anecdotes, some of them apocryphal, about odd individual results in litigation. One might as well note, as I have read recently, that a faulty voting machine is reported to have given lobbyists enough time to save a tort reform statute in the Louisiana legislature this summer. Certainly, there are lots of stories that can be told, including thousands of stories about consumers who have been properly compensated under both old and new products liability doctrines. But I do not think that it is the odd case, or any individual case, that you want to concern yourself with. What is at issue is the welfare of millions of consumers, as well as thousands of entrepreneurs and of a legal system that, for all its faults, serves us well on the whole.

I mentioned, Mr. Chairman, that I have recently completed a treatise on the law of products liability. That is not a book that takes sides in political arguments. It tries to describe the law as it is developing, with a lawyer's critical focus. I am now engaged in study and writing for a periodic supplement of that book. I have found that a fascinating experience from the point of view of my assignment in this hearing. Because in concentrating intensively on a very large number of the most recently decided cases, I can report the distinct impression that the American courts are not engaged in radical experimentation. To the contrary, they are marching cautiously with the understanding that having created this new body of law, they must rationalize it with even greater care. And I venture that even if we could agree on which decisions are "mistakes"—in quotes—that for every "mistake" the courts make, they do a dozen, or maybe dozens, of things right, or right enough. And when they do make a mistake, it is restricted to a particular jurisdiction, and to a particular fragment of doctrine. When Congress makes a "mistake"—also in quotes—that problem is visited on the nation as a whole. And you will have to change a majority of 100 minds in one House and 435 minds in the other in order to undo that mistake, instead of a majority of the seven or nine or at most fifteen judges on a state court of last resort or on a federal court of appeals.

While I have been asked to focus on the effects on the tort law of a preemptive federal statute, in passing I want to remind the committee what I said here on a previous occasion about the insurance question: If you bite the apple of products liability, you will have to deal with the whole orchard of insurance.

Again centrally referring to the question I have been assigned, I will note that many of the proposals for so-called "reform" of products liability law are little cousins to other, broader, proposals for "tort reform." I want to point out that changing products liability law in any one of many ways will tend to confuse other parts of tort law.

Let me mention two illustrations of the possible effects of some recent proposals, one having to do with another tort doctrine and another specifically referring to products liability.

First, one may well ask whether if Congress eliminates strict liability for products, what the courts should do about strict liability for ultrahazardous or abnormally dangerous activities.

Second, to present just one example in the area of products liability itself of an unmerited reform proposal, I think it would be unfortunate to preempt federally the body of state law that deals with nonmanufacturer liability. Reasonable persons may differ on the wisdom of various state rules, but these problems often are sufficiently tied to local economic arrangements, and certainly so responsive to reasoned local judgment, that it seems to me wrong as a matter of federal policy for Congress to take such a step. I note also that it is my personal opinion that such a blanket rule would be, on the whole, wrong as a matter of substantive law.

But it seems to me that Congressional concern about the relationship of a federal products statute with other areas of the law should be much broader. In particular, you should be considering how our injury law relates both to safety regulation and to various compensation programs.

As to public regulation, one can hardly read a newspaper without a sense that with the failures and laxity of many regulatory processes, what we need is more and not less tort law. I find it particularly interesting that Senator Danforth, whose probing questions to me on past occasions of this sort have been so stimulating, should express continuous concern about various aspects of auto safety. And we all

have read statistics about increased dangers in the area of occupational safety and health; we all know about the paralyzing warfare within the Consumer Product Safety Commission.

As to the varied compensation programs that provide funds for injury victims, among others, it is a commonplace that the disability program under Social Security occasions enormous amounts of litigation. It is equally perceived that workers compensation, however it is financed, leaves a good deal to be desired as an effective and just method of redress for injuries.

Let me add one other point that I have made on previous occasions. It relates to what I understand was a principal subject of your first panel, "federalism." I just do not see how you can simplify the law by imposing a federal statute on top of more than a hundred years of state common law history. Not only would such legislation be likely to complicate things conceptually. It would create a nightmare of complexity in the process of review. For example, on frequent occasions, there would be state courts construing a federal statute, often calling on prior state law for guidance in confusing situations, and all of that subject to review in both state and federal appellate tribunals. I won't say I can not think of more confusing situations, but I can't think of very many situations *as* confusing that could be avoided by simply not passing a law that would, in addition, have a lot of other problems connected with it.

Senator GORE. Your statement is most appealing to the subcommittee.

We will review your written statement with great care and certainly make every effort to schedule those 20 hours.

Victor Schwartz is our final witness, representing the Product Liability Alliance. And we welcome you. Please proceed.

STATEMENT OF VICTOR E. SCHWARTZ, COUNSEL, PRODUCT LIABILITY ALLIANCE

Mr. SCHWARTZ. Mr. Chairman, I appreciate your time this morning.

I am interested in the variance of law question, because I worked with John Wade on our casebook, Cases and Materials on Torts, for over 15 years. We are just finishing the eighth edition. And if you need evidence or your staff needs evidence of the variance in product liability law from state to state, just a quick review of the casebook will demonstrate.

Senator GORE. Would you be willing to abide by John Wade's judgment on this matter?

Mr. SCHWARTZ. He supports the idea of having uniformity.

Senator GORE. Would you be willing to abide by his judgment on this legislation?

Mr. SCHWARTZ. I would say that we could work together to come to a solution.

Senator GORE. But if the subcommittee inquired as to his vote yes or no, would you be willing to accept his vote?

Mr. SCHWARTZ. On the issue of Federalism, yes. On the issue of uniformity, yes.

Senator GORE. What about on the issue of the proposed laws that are before us?

Mr. SCHWARTZ. In general, I think that on most issues he would find agreement, but not all.

Senator GORE. I will not press you too hard.

Mr. SCHWARTZ. If we have worked through three editions of the casebook, Senator, we have a way of getting together. We have spent a lot of time together.

There are areas where uniformity can help. It can remove chilling effects that are out there in the introduction of new products or existing products, as the gentleman from Cosco Industries has said. It can enhance product safety, as Mr. Kimmelman has said.

Product liability law has been a force for safety, but having variant rules and one state telling the manufacturer one thing and another state telling him exactly the opposite cannot as a matter of common sense bring about safety.

If you have the same safety rules in all the states, just the way the CPSC does it, you are more likely to have safe products. It can reduce transaction costs and legal costs. I have been a practicing lawyer for the past eight years, and cases are strewn out for years because neither side knows what the rules are, and either side is also trying to jump from one forum to another, and forum-shopping is rampant in the United States today.

And finally, uniformity of rules provides a rational basis for setting rates and premiums. It is true that there are a lot of reasons that insurance costs go up and down, but they do not go up and down in life insurance, they do not go up and down in accident insurance. They go up and down here because the product libility rules are absolutely fluid.

The business community, as contrasted with the past where it has had long laundry lists, is really just interested in a few things. There are some provisions in the bill where a virtual consensus has been reached, 16 to one, or no opposition votes from this entire committee.

Let us get those things moving forward, and let us reduce the issues to maybe four areas and concentrate on those four:

One, should there be a fault perimeter? We believe there should. Product liability law should not be totally open-ended.

Two, let us modify joint and several liability in some way that we can all agree upon. The committee came close, very close, last year. It is ridiculous to have joint and several liability rules for products change as you go from state to state or have the rule depend on where you happen to have been injured.

Third, let us have uniform rules on punitive damages.

And finally, to the extent we can, let us reduce double payments to plaintiffs in a reasonable way to. If we do that, we have made a limited and reasonable entry. We have not changed the whole law of the United States.

We have really reached a consensus. I am willing and we are willing to work with our brothers and sisters on the consumer side and with you, Mr. Chairman. If you resolve this one, product liability, and build a consensus, I think a lot of people will have a lot of admiration for you, both locally and nationally.

Thank you.

[The statement follows:]

STATEMENT OF VICTOR E. SCHWARTZ, COUNSEL, THE PRODUCT LIABILITY ALLIANCE

Good morning, Mr. Chairman, I want to thank you and Senator Hollings for your very kind invitation to testify about the effects of product liability standards on the activities and laws of the several states as well as on product safety and manufacturing practices.

My interest in product liability began with my studies as a law professor over twenty years ago. I also examined the topic as Chairman of the Federal Interagency

Task Force on Product Liability under Presidents Ford and Carter. At present, I am an adjunct professor of law at Georgetown University and Chair the Torts and Insurance Practice Group at the law firm of Crowell & Moring. I am currently completing the Eighth Edition of Prosser, Wade and Schwartz, Cases and Materials on Torts, which is the most widely used torts casebook in the United States. I serve as counsel to the The Product Liability Alliance, which is a member of the Product Liability Coordinating Committee. These groups have made great strides since we last appeared before you and have developed both more harmony and clarity in their positions on this subject.

Apart from establishing better coordination among different business groups, we have focused on key topics that are of the greatest importance in product liability reform. This has eliminated any type of "laundry list approach" that may have hampered the viability of proposals in the past.

The hearings that have been held by this Committee in the 97th, 98th and 99th sessions of Congress provide useful documentation about the need for uniform structured product liability law. I value the opportunity this morning to address both the members who served on the Committee in some or all of those sessions and the new members of the Committee who may be less familiar with the product liability problem. In that regard, perhaps it is best to focus on the most salient points about this legislation.

I will spend a moment on vital fundamentals. As our casebook shows, for over 200 years tort law and product liability law has been formulated largely by judges. Why, then, is it necessary to have statutory liability law? This need arises because there has been a decisive change in the attitude of some judges in the formulation of product liability rules. For almost 200 years when judges changed the law, they did so slowly, incrementally, one step at a time. In the past 10 years, however, the changes have become much more dramatic. Courts have made fundamental changes with stark suddenness and have retroactively created new rules of law. This retroactive creation of new rules produces at least four major adverse effects on commerce. First, it stifles the introduction of new and useful products; second, it makes product liability insurance ratemaking more difficult both for those who self-insure and for commercial insurers; third, it compromises a manufacturer's ability to make safe products and; fourth, it greatly increases transaction and legal costs.

Let me give you a recent example that shows all four adverse effects. Under product liability law in many jurisdictions courts and juries evaluate whether product warnings are "adequate" or whether a product's design is "unreasonably unsafe." In other words, if the warnings are clear and adequate there will be no liability on that ground and, if a design meets the expectations of a reasonable consumer, liability will be avoided on that ground. In many jurisdictions a defendant will not be subject to liability if his product complied with the practical, technological knowledge that was available at the time of manufacture. Nevertheless, in March of this year an appellate court in Louisiana held that a manufacturer of an ordinary well build escalator would be liable because the court felt "risks created by escalators outweighed their benefits to society." In other words, escalator manufacturers (and Sears Department store where the escalator was installed) would be absolutely liable regardless of whether they used the very best technology and regardless whether their warnings were letter perfect. A decision of this type, which may or may ot be reversed on appeal, can cause major disruptions in interstate commerce. It is strong evidence that we must put fundamentals of product liability law in clear and concise rules.

Why should these rules be enacted at the Federal level? Over 40 states have passed tort reform bills of one type or another. Very recently, statutory changes have been enacted in California, New Jersey and Texas. Unfortunately, these constructive changes have not ended the variances in law from state to state. For reform to really "work" in product liability, the rules have to be similar and congruent in all states. The reason for this is based on both facts and common sense. Manufactured products are shipped in interstate commerce. Thus, a reform in one state cannot provide great help to the manufacturers of that state—an average of over 70 percent of goods are shipped out of state. By way of contrast, the principal effect of uniform Federal product liability standards will be to allow manufacturers to distribute goods to each state and have a reasonable idea of what will be expected in the event of a product injury. If the standards are drafted in a clear and coherent manner, we will not be plagued by 51 different "interpretations".

As you formulate Federal product liability rules, you can look to what the states have done both in their case law and in their statutes. There is a ready resource that has been built up over 20 years. The Congress has been called upon to do this by organizations that have a distinct "states rights orientation", such as the Ameri-

can Legislative Exchange Council and the National Governors' Association. Congress also has been urged to take this step by prominent jurists who have distinguished themselves in the field of products liability such as, Federal Judge Warren Eginton and the Honorable William Dreier of the State of New Jersey.

If we work together and do our job well, uniform Federal product liability laws can overcome four key deficiencies in the present system.

First, uniform rules can end inappropriate chilling effects against the introduction of new and useful products.

Second, uniform rules can make the process of setting insurance rates and premiums more rational and reasonable both for those who self-insure and for those who commercially insure. While financial factors and variation in interest rates played a part in creating the most recent liability crisis, it is important to note that similar "swings" in rates and premiums did *not* occur in the areas of life and homeowners insurance. This is because those areas are more predictable and stable and can weather changes in the financial market and investments. Statutory uniform product liability law can create stability so that there can be reasonable, actuarial assessments. Statutory uniform product liability law can create stability so that there can be reasonable, actuarial assessment of liability risks.

Third, uniform rules can place incentives for accident prevention on the person or persons who are in the best position to prevent an accident. Those incentives must sometimes be placed on a manufacturer, sometimes on a product seller, sometimes on a employer or person who actually uses the product. Product liabillity law is perhaps our greatest current engine to help assure product safety. Uniform product liability law can make that engine work better.

Fourth, uniform rules can reduce litigation and legal costs. Where product liability law is fluid and unpredictable, it is more difficult to settle cases fairly and promptly. I know this as a fact from my practice experience. As results become more speculative, and "the law" becomes more of a lottery than a system of justice, the principal beneficiaries are attorneys—both plaintiff and defense attorneys. Of equal importance is that the current system is a major stimulant for forum shopping. Claimants' attorneys, with good reason, will try to bring their cases in the state that seems to have the most favorable rules from their perspective; defense attorneys will do the same thing—all of this generates more and more legal costs as lawyers wander around our country looking for the best forum. While attorneys have become subject to many criticisms, I can assure you that responsible attorneys do not want to generate fees based on an unstable and unpredictable legal system. Uniform product liability law can stabilize the system and reduce lawyer costs.

KEY AREAS OF REFORM

What are the key areas where reform is needed? Well, fortunately, in some areas a readily developed consensus has arisen, and they have been reflected in S. 666 and the overwhelming votes in support of those provisions before this Committee last year. There are areas where there are still some controversy, and I am going to focus on four of them this morning.

ESTABLISHING A "FAULT" PERIMETER

First, with respect to design of and warnings about products, liability should only be imposed when manufacturers are at fault and objectively responsible for a harm. I am not talking here about old fashioned negligence, but responsibility measured by an objective standard. The law should make the manufacturer do the best job he can to make his product safe, but if he did not have the ability to discover or eliminate a hazard based upon engineering and technological knowledge at the time he made the product, he should not be subject to liability. Fashioning a law of this type places fair, firm and realistic safety incentives on manufacturers. Dean John Wade, the Reporter of the Restatement (Second) of Torts, has explained that fault is the appropriate basis for liability for product design and warnings. The history of the Restatement shows this to be intent of its authors. Recent examination of case law shows that a fault perimeter can be found in the law of most states.

A recent poll conducted by Louis Harris & Associates shows that the overwhelming majority of the public, by a 71 to 26 percent margin supports using fault as the standard for manufacturers' liability.

Apart from encouraging safety, a fault perimeter on liability will stabilize the insurance system. There will no longer be that apprehension of total open-ended liability—liability that is imposed no matter how carefully a manufacturer strives toward safety. It will reduce litigation because neither side will be forced to specu-

late about the possibility that some court will impose liability regardless of individual responsibility.

A BALANCED RULE OF JOINT AND SEVERAL LIABILITY

Second, the rule of joint several liability, which makes one person responsbile for the damage caused by others should be modifed along the lines set forth in S. 666. The same Louis Harris survey shows that 71 percent of the persons polled are in favor of ending the joint and several liability rule. That rule discourages the most culpable of wrongdoers from having adequate insurance coverage—they know that the principle of joint and several liability encourages plaintiffs' counsel to "reach for the deep pocket." If all individuals knew that they would be held individually responsible and would have judgments enforced against them, we would clearly have a better system of safety. Moreover, the rule of joint and several liability when broadly applied compromises an actuary's ability to make a reasonable assessment of risk. It is difficult enough in today's legal climate to make an assessment about the potential liability of one's own insured, it is impossible to speculate about the liability of other people with whom one's own insured has no relationship. Both S. 666 and H.R. 1115, the principal House bill, strike a compromise in this area. It is based on a proposal that was strongly endorsed by the voters of California. The proposal retains joint and several liability for economic losses, i.e. loss of earnings and medical costs. On the other hand, it eliminate joint and several liability for non-economic damages or pain and suffering. In light of the fact that non-economic or paid and suffering damages were developed as a sanction against wrongdoers, it is unjustifiable to apply joint and several liability for so-called non-economic losses beyond the percentage of responsibility as determined by a jury of their peers.

States have made major advancements in this area with over a dozen states in the past two years modifying or eliminating joint and several liability. Unfortunately, the changes are far from uniform. Forum shopping will be rife unless a uniform Federal standard is adopted.

CLEAR STANDARDS FOR PUNITIVE DAMAGES

Third, clear and reasonable standards and procedures should be developed for awarding punitive damages. Those who "oppose" such reforms argue that punitive damages are rarely awarded, so no reform is needed. While a full-blown statistical war can squander the time of this Committee about that topic, it is absolutely certain that punitive damages are sought in many, many products liability cases. Plaintiffs' attorneys ask for them even though they are unlikely to be awarded. Why is this true? It is true because most plaintiffs' lawyers know that certain very prejudicial evidence can be brought before the jury if one asks for punitive damages.

For example, one can introduce evidence of the defendant's wealth under a theory that the jury needs to know about this wealth so that it can properly "assess" a punishment. But what if, as in the case in most situations, no punishment is justified? The jury still hears the evidence about defendant's wealth and this can cause it to overlook the facts as to whether or not the defendant is truly liable—the jury may be driven to render an award simply because the defendant appears to be able to pay for it.

In effect, the present system foments unnecessary litigation and legal costs in the area of punitive damages. A Federal product liability bill can end this by establishing procedures so that the punitive damage system cannot be misused—separate procedures should be established for dealing with liability for compensatory versus punitive damages.

Punitive damage litigation is also fomented because the "standard" for punitive damages vary substantially from state to state. This is another inducement for forum shopping. A simply and useful approach as set forth in S. 666 and H.R. 1115 is to have a national, clear standard for punitive damages.

REDUCE DOUBLE RECOVERIES

Fourth, to the extent possible, the tort system should not permit an injured person to recovery twice for the same harm. That occurs today under a doctrine called "the collateral source rule". This rule says that a defendant should not be permitted to show that the plaintiff has already been paid by another, collateral source. The reason for the rule is that a defendant wrongdoer is not supposed to benefit from the fact that a provident plaintiff has been compensated by another source. Unfortunately, a rule that was predicated on defendant's wrongdoing has been fully applied when a defendant is held liable without fault. It has also been applied when the plaintiff has collected funds for reasons other than his or her own

providence. It is interesting to note that of the persons polled in the Louis Harris survey, 67 percent supported abolishing rules that allowed double recovery. Where an individual has personally paid a premium to obtain accident protection, it is appropriate to continue the collateral source rule. But in other situations we do not foster the goals of stabilizing the insurance system, encouraging safety, reducing legal costs or encouraging the introduction of new and better products by continuing double payments. At the very least, evidence of collateral sources not paid for by the plaintiff should be admissible in product liability suits.

OTHER "CONSENSUS" PROVISIONS

Over the years of hearings held by this Committee certain provisions that will foster all four positive goals in the product liability system have received very substantial support: they are included in S. 666 and H.R. 1115. For example, last year, a statute of repose for capital goods of 25 years was approved by this Committee by voice vote. A provision limiting the liability of product sellers to where they were at fault received support of 16 to 1. The provision encourages product sellers to deal with responsible manufacturers because they must absorb "manufacturer" liability if the manufacturer is out of business or cannot be reached by judicial process. This provision also saves legal costs. S. 666 and H.R. 1115 approaches to workplace liability problems place incentives on employers to keep their workplace safe. They also reduce legal and transaction costs. This proposal, too, had overwhelming support from this Committee.

Finally, it has been virtually unquestioned that if we are to place incentives for accident prevention where they will do the most good, a person should not be able to recover money damages if the accident was primarily caused by his own intoxication or use of illicit drugs. This provision appears both in H.R. 1115, S. 666 and was given overwhelming support by this Committee.

"ADDITIONAL BAGGAGE"

Over time other provisions have been included in Federal products liability proposals, but we must respect the fact that we are dealing with a "four-ton truck" and cannot load ten tons of material on it. It is true, indeed, that this will be the first time that we have Federal statutory product liability law. If the proposal is kept short and addresses key standards, the Committee will produce a feasible law and have time to evaluate its effectiveness. This step should facilitate settlement of cases because the basic perimeters of liability will finally have been established. It is easier to settle cases when the players know the rules of the game. The proposals that I have mentioned today are well documented both as to their need and rationale. They are all based on approaches developed in the states and by the Federal Interagency Task Force.

THE "ANTI-CONSUMER MYTH"

We need to put to rest the idea that these reforms are "anti-consumer". First, an objective Louis Harris Poll has shown that the majority of Americans favor these reforms. Second, these reforms will place incentives for making safe products on the parties that are best able to fulfill that goal. Third, they will reduce unnecessary legal and transaction costs. Fourth, they will remove obstacles to the introduction of new and useful products for our society. Finally, they will stabilize the system for self-insurers and commercial insurers alike because they will under such provisions be able to make better and more accurate actuarial assessments of risks.

A final note on this last point. This Committee has helped develop and enact the Risk Retention Acts of 1981 and 1986. These proposals make it easier for businesses that are dissatisfied with or left out of the commercial insurance system to have an alternative—practical self insurance. They also help assure that savings brought by uniform product liability law will be realized by insurance buyers and the American public. It is important for this Committee to assure that the Risk Retention Act works.

Mr. Chairman, it is our hope that those who have supported product liability legislation in the past will work with those who have had reservations about it in order to develop a fair and reasonable consensus on the subject. We welcome the opportunity to create a basis for such a consensus, more refined and more succinct than past proposals. As we enter the end of this decade, let us address what has been a continuing major problem for interstate commerce, one that will grow worse unless we act to put it to rest. Enactment of uniform, balanced and concise product liability law will achieve that end; this Committee has the opportunity of taking that step now—it should do so.

Senator GORE. What an appeal.

I wish to assure all of you that your written statements will be studied with great care by the committee.

We really appreciate your cooperation and your contribution here. This hearing is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF DEBORAH CHALFIE, LEGISLATIVE DIRECTOR, HALT—AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM

HALT—An Organization of Americans for Legal Reform appreciates this opportunity to submit written testimony for the record concerning product liability and the need to create alternatives to the tort system.

Although HALT is pleased that the Consumer Subcommittee decided to hold a hearing on this important issue, we are disappointed that you appear to be starting from scratch in your consideration of legislative proposals. During the past few Congresses, product liability reform has been the subject of extensive hearings and debate. In the 99th Congress in particular, several balanced proposals were carefully considered and a bipartisan consensus of Committee members was reached. It would be senseless to cast aside that hard-won consensus and permit all of that good work to come to naught.

We are confident that you will not let manufacturers talk you into adopting selfish rollbacks of victims' rights. But don't let other interest groups talk you into doing nothing. As HALT has repeatedly emphasized, whether there exists an insurance crisis or not, the tort system is slow, expensive, inequitable, and unpredictable. Users of the legal system need balanced reforms that will:

(1) Increase certainty of recovery for victims and of liability for defendants.

(2) Lower transaction costs to the parties and to society.

(3) Permit victims to recover compensation as soon as possible after the injury.

(4) Simplify the process for obtaining compensation.

(5) Provide for full and fair compensation of at least all of the victim's past and future economic damages.

(6) Offer the parties a meaningful choice among many alternatives, based on adequate information.

(7) Maintain incentives for safety and requirements for accountability.

We urge this Subcommittee to pick up where it left off and give serious consideration to legislation that creates alternative compensation systems. By providing certain, speedy, and fair recovery to victims and predictability to defendants, out-of-court, neo-no-fault compensation systems hold the greatest potential for overcoming the tort system's shortcomings and preserving its benefits.

STATEMENT OF WARREN W. EGINTON, U.S. DISTRICT JUDGE, DISTRICT OF CONNECTICUT

I. PROFESSIONAL BACKGROUND AND QUALIFICATIONS

My name is Warren W. Eginton. On July 24, 1979, I was confirmed by the U.S. Senate to be a District Judge for the District of Connecticut and have been sitting continuously since that date at Bridgeport. My comments respecting Senate Bill No. S. 666 express my views as an individual. They are not presented in behalf of any organization of judges, and are not intended to reflect the views of any other of my judicial colleagues, either federal or state.

From 1960 through June, 1979, as a partner of the law firm of Cummings & Lockwood in Stamford, Connecticut, I represented clients in major product liability litigation, primarily conducted in federal courts throughout the United States. During those two decades I participated in aircraft accident litigation involving, among others, the crash of a United States Navy blimp, of a United States Army helicopter, and of a private helicopter as well as fixed wing aircraft. Other major product litigation involved incinerators and power plants located throughout the United States, and various categories of durable goods. The highlights of those cases were presented in detail to the Senate Committee on the Judiciary at the time of my confirmation in 1979. I was a founding member of the Product Liability Technical Committee of the American Society for quality Control, and a member of the Product Liability Committees of the American Bar Association and of the Defense Research Institute.

My experience with product liability legislation, as distinct from litigation, began in 1970 with the issuance of the report of the National Commission on Product Safety chaired by Arnold Elkind, Esq. of New York. That committee included in its recommendations a principal conclusion that consumer legislation presented such a "hodgepodge of tragedy-inspired responses to challenges" that a federal presence was required to exercise "central leadership" with respect to the enactment of appropriate legislation on the state or federal level. Specifically, the commission concluded as early as 1970 that there was "a need for a major federal role" in the development of product liability legislation.

My conduct of product liability seminars during the 1970's included instruction concerning the Consumer Product Safety Act and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. This led to a strong interest in the work of the Federal Interagency Task Force on Product Liability when that group was created in 1976. In Connecticut during the late 1970's I participated in a group representing all interested factions in the drafting and promulgation of a product liability act for that state. Connecticut enacted the first comprehensive state product liability legislation to be modeled after the Uniform Product Liability Act, (UPLA) effective July 6, 1979. Unfortunately, the drafters of that legislation, including myself, ignored the warning prominently displayed when the interagency task force issued its comment draft in January, 1979. The task force recommended that state adoption await the final version of UPLA. However, the comment draft was the best then available, and so Connecticut adopted many of its major provisions, which were subsequently amended significantly in the final version of UPLA published in October, 1979.

Since 1979, and my role change from litigator to judicial officer, I have concentrated on a limited area of product liability litigation. I consider it proper for a judge to participate in discussions concerning product liability legislation, both state and federal, because of the obvious impact of such legislation on the conduct of a product liability trial. I have published papers, which are attached hereto, on UPLA, on S. 2631, the Product Liability Act introduced in the 97th session of the Congress, on S. 44, the Product Liability Act introduced in the 98th session of the Congress, and most recently on S. 100, the Product Liability Act introduced in the 99th session of the Congress.

II. THE HISTORICAL FAILURE OF STATE LEGISLATION

When I met Victor Schwartz at an Atlanta seminar in 1979, there was no one in my experience more enthusiastic and dedicated than this then-chairman of the interagency task force. He spoke frequently and affirmately in behalf of this comment draft and later in behalf of the final version of UPLA. Little did he or many others envision how difficult would be the task of promoting uniformity among the state legislature in enacting this bill. The history of the Uniform Sales Act, followed by its success or the Uniform Commercial Code, and the history of such uniform acts as the Uniform Reciprocal Support Act gave credence to the confidence expressed by Victor Schwartz. Many such acts had been adopted with effective uniformity by legislatures throughout the United States. Such as not to be the history of UPLA. It soon became apparent, as I have noted in an earlier paper attached hereto, that the complexities of drafting legislation that would be satisfactory to a plurality, let alone a majority, of the individuals and entities by the product liability explosion would prove insurmountable. At numerious seminars over the past three years I have encounted only a handful of panel members, coming mostly from academia, able to assume a dispassionate, reasonably objective view of the problems and the solutions. For the most part the rhetoric of opposing viewpoints made consensus impossible to achieve. In may instances the goals of some of the participants were too extreme to permit compromise. Surprising to some, the American Bar Association and large segments of the defense and issurance bars jointed the strong attack on the legislation mounted by attorneys representing plaintiffs in product liability cases. Segments of the insurance industry were fragmented, as were manufactured and large and small business entities. There is ample justification for the change of position taken by Victor Schwartz, who now concedes the failure of his legislation efforts to achieve unformity in the various states, and who strongly favors the adoption of a national product liability act.

My own view, from the judicial standpoint, rests on a bias that uniformity is desirable. This in turn is based upon my years of experience in trying federal cases throughout the United States and finding that the uniformity of the famed Federal Rules of Civil Procedure simplified the burdens of trial and led to economies and reduction in transactional efforts that were significant to me and to the clients I represented. I have had the same experience on the bench with the Federal Rules of

Evidence. I conclude that the more that uniformity can be accomplished throughout the states, either by national legislation or by uniform acts, the more quickly the litigation will flow and the lighter will be the economic burden on all parties involved. Certainly, the task of the judge and of the juries in understanding the problems and the rules of law to be applied to those problems will be greatly simplified by uniformity.

III. BENEFICIAL FEATURES OF THE FEDERAL PRODUCT LIABILITY LEGISLATION

Senate Bill No. S. 666 sets forth a goal "To regulate interstate commerce by providing for a uniform product liability law . . . ." In many important respects, that goal is accomplished by S. 666 as now drafted. The purpose of the interstate commerce regulation through this bill is to create uniform standards throughout the 50 states, thereby reducing the burdensome transaction costs experienced in product liability litigation over the past two decades. In the following respects, in my judgment, the bill provides clear and reasonable guidelines enabling parties to potential litigation to identify their rights and obligations, in turn facilitating settlement or providing a degree of certainty to the course of the litigation.

Senate Bill No. S. 666 is a positive step forward in major areas in which uniformity has been notably lacking to date. In my judgment these areas are embodied in Sections 102 (Uniform Definitions); 302 (Uniform Standards of Liability); 303 (Uniform Standards for Punitive Damages); 304 (Uniform Statutes of Limitations and Repose); and 306 (Worker Compensation Offset).

In all of the foregoing significant areas, it is my judgment that the proposed legislation will establish clarity and uniformity, and will substantially reduce transaction costs, both direct and indirect, associated with product liability litigation to date. I perceive no negative aspects to any of those proposed sections of the bill.

IV. LEGITIMATE AND UNREASONABLE EXPECTATIONS CONCERNING SENATE BILL NO. S. 666

As I have noted above, I believe that the proposed federal product liability legislation will accomplish the primary goals of reducing transaction costs of all types and to all parties involved with product liability litigation. There is, however, in my judgment, one major area in which this legislation will have no effect on the cost of a product liability lawsuit. I have seen no proposed legislation sponsored by any organization that will minimize the need of the parties to introduce expert testimony as a critical portion of the evidence. In my commentary on the original Uniform Product Liability Act as commentary on the original Uniform Product Liability Act as published in 1979 by the Federal Interagency Task Force, I used the acronym CEFEA to denote the legislation as the "Consulting Expert Full Employment Act." I do not envision that any of the noted experts specializing in product liability litigation will have to draw upon social security or any other pension or retirement benefits in the foreseeable future. So long as their health holds up, their prime concern will be to juggle airline schedules to meet deposition and trial attendance requirements.

In conclusion, so long as all entities involved are willing to recognize that in certain areas there is probably no legislation that can effect a cure, then I believe that there is a good possibility for more unity than now exists as to the necessity for national product liability legislation such as Senate Bill No. S. 666 which, on balance, I strongly favor from the viewpoint of a judge who would benefit from uniformity, both in the course of the trial and in the area of settlement before the trial has to commence.

STATEMENT OF RICHARD B. GELTMAN, STAFF DIRECTOR, COMMITTEE ON ECONOMIC DEVELOPMENT AND TECHNOLOGICAL INNOVATION, NATIONAL GOVERNORS' ASSOCIATION

Mr. Chairman: Thank you for inviting the National Governors' Association to provide testimony on the subject of product liability. This is a subject of importance to all Governors because of its implications for commerce, economic growth, and the welfare and safety of our citizens.

After much deliberation, the National Governors' Association (NGA) has decided that it is appropriate for Congress to enact a federal uniform product liability code. While our general position is that Congress should avoid preemption of state laws and policies, there are at times highly compelling reasons to justify federal actions that override state laws. In the case of product liability the case has been made. A copy of NGA's policy position on liability insurance, which addresses the issue of product lability, is attached.

Preceding the passage of its policy statement, the National Governors' Association convened a Task Force on Liability Insurance to examine the issues related to the liability insurance crisis, including reasons for lack of availability and affordability of insurance for manufacturers of products, ranging from football helmets to hot air ballons, from immunization vaccines to automobiles. The Governors concluded that inconsistent state product liability laws and the inability of manufacturers or insurers to predict potential liability or calculate appropriate insurance rates have impeded interstate and foreign commerce.

A national uniform product liability code should increase interstate commerce by reducing some state barriers to the national marketing of products; make product liability risks more predictable by establishing one, relatively stable, legislated, set of standards rather than fifty-five dynamic ones; make pricing of manufactured goods and product liability insurance easier; reduce product prices; and increase corporate profitability. To ensure these advantages are not brought about at the cost of reduced public safety and consumer protection, federal safety and consumer protection standards should be enhanced.

As part of its uniform product liability code, the committee should consider the possible adoption of some of the more rigorous safety standards existing under state law. The committee shoud also consider: permitting state attorneys general and injured parties, themselves, to bring class action suits in favor of consumers against manufacturers; permitting punitive damages and non-economic damages, and requiring incidental and consequential damages, for harm resulting from intentional or conscious tortious conduct; and ensuring that foreign manufactured products are subject to the same safety standards as domestically produced goods. These and other federal safety and consumer protection standards should be considered as part of a more effective and efficient product liability system.

In conclusion, the National Governors' Association urges you to adopt a federal uniform product liability code. Because products are manufactured, marketed, and consumed in the various states, uniform standards of liability need to be developed to overcome the differences in state product liability law that presently inhibit interstate commerce. At the same time federal legislation can and should enhance safety and consumer protection standards.

LIABILITY INSURANCE

The National Governors' Association recognizes the growing national problem of the liability insurance crisis. Affordable liability coverage has become increasingly more difficult to obtain or has simply become unavailable, resulting in a severely adverse effect on government entities, public and private organizations, businesses, and professionals throughout the nation.

The National Governors' Association believes that the nature and extent of the problem of liability insurance requires the coordinated efforts of federal, state, and local governments and the private sector. Specifically, the National Governors' Association supports actively working to resolve this national issue through continued review and analysis of the problem, collection and dissemination of statistical and legislative data on federal and state programs and initiatives, and development of long-term policy goals that will effectively counter the escalating problems of the liability insurance crisis.

The issue of product liability reform has increasingly pointed to federal action as a way in which to alleviate the problems faced by product manufacturers with regard to inconsistent state product liability laws. This lack of uniformity makes it impossible for insurers to predict accurately the potential liability of product manufacturers and insurers. Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. Furthermore, the system causes inflated prices for our consumer goods, the discontinuation of necessary product lines, and adversely affects the international competitiveness of the U.S. Governors urge Congress to adopt a federal uniform product liability code.

In establishing a uniform product liability code, Congress should assess the impact of a uniform code on public safety and consumer protection and, if deemed appropriate, enhance federal safety and consumer protection standards.

The Governors further believe that the insurance industry of America provides an important and vital public service to consumers and the private sector. As we call for the adoption of a national uniform product liability code, we believe there must also be effective oversight of the insurance industry so as to guarantee that the needs of both American businesses and American consumers are met and protected. This is especially important in light of concerns which have been raised concerning

rate increases, the availability of insurance, industry practices on cancellation and non-renewal of policies, coverage restriction, and reinsurance.

STATEMENT OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

On behalf of the over 500,000 members of the National Federation of Independent Business, I would like to thank you, Senator Gore, for holding this hearing on the liability crisis and express our appreciation to the rest of the Subcommittee members for participating in them.

As you may know, the National Federation of Independent Business has been concerned over the years about the general issue of insurance. NFIB primarily represents main street and rural small businesses—the average member employs less than ten individuals. NFIB members could be considered a leading indicator of the economy. When the general economy prospers, our members generally prosper. When the economy does not do so well, our members generally feel immediate economic pain through lower sales of goods and services.

Because NFIB represents such a cross section of small business, we believe we can say with certainty that NFIB speaks for America's entrepreneurs. And the concern dominating entrepreneurs' thoughts is insurance.

NFIB members were among the first to feel the so-called "liability insurance crisis" experienced in our country over the past several years. It's appropriate to use the phrase "liability insurance crisis" because many saw no logical or market-based justification for small business liability insurance premiums dramatically increasing in price regardless of their risk rating, or for the significant cut many faced in insurance coverage. NFIB has received many calls and letters from small business owners who were good risks for liability insurance policies but who cannot even get insurance, no matter the price, because policies were no longer offered.

I am here before this Subcommittee today because the liability insurance issue is probably the most critical and serious issue confronting small business. NFIB's Institute for Enterprise Advancement issued its Small Business Problems and Priorities in June of last year, ranking the top 75 problems small businesses face. In that survey, small business ranked the cost and availability of liability insurance as the number two problem. However, 38% of small business viewed this as a critical problem, the highest percentage describing a problem as "critical" in the survey.

Furthermore, NFIB's field force of over 700 individuals regularly conducts a field survey with small businesses across the nation to get a sample of their views and concerns. Recent field surveys provided the following data:

Asked the question of which issue is the most important affecting business, 44% chose liability insurance;

Asked if liability insurance premiums had increased by 50% or more, 41.5% said yes.

These field surveys reveal to us, Mr. Chairman, that the liability issue has not gone away.

Furthermore, the number one priority at the White House Conference on Small Business, made up of 1,813 delegates and held in Washington last August, was the liability insurance issue. Part of the recommendation was to reform our current tort system. I have attached the recommendation to my testimony for the hearing record.

All of these data tell me that the insurance issue is on the minds of small business owners everywhere and that action must be taken to resolve the problem.

While you may have heard examples of small business difficulties with liability insurance, I would like to give the committee some examples of problems generally being faced by NFIB members:

—A laundromat owner in Corpus Christi was sued because a lady was mugged in one of his laundromats. He refused to pay, but his insurance company settled with the lady out of court. In 1985 he paid $900 for $2 million in coverage. In 1986 he paid $3,625 for $1 million in coverage.

—A small chemical company (14 employees) in Gulfport, Mississippi paid $4500 for $300,000 coverage. In 1986 they were quoted a premium of $38,000 for $500,000 coverage.

—A campground in Hagerstown, Maryland in 1985 was charged less than $1000 for $1 million in coverage. In 1986 the same coverage cost $8000.

—A plumbing and heating contractor in Warren, New Jersey received notice that his policy had been cancelled without explanation.

—An aircraft corporation in Waco, Texas paid $25,000 in 1983, $50,000 in 1984, and $200,000 in 1985 for $2 million in coverage.

—A five-and-dime store in New Lexington, Ohio has seen premiums increase 20% between 1984–1985 and 50% between 1985–1986.

—A manufacturer of food processing machinery in Marblehead, Ohio paid $50,000 with a $2500 deductible in 1985. In 1986 the premium was $150,000 with a $50,000 deductible. The 1986 policy also required the manufactuer to pay legal expenses for settling claims and to provide a letter of credit to the insurer in the amount of $300,000.

—An elevator repair and maintenance company on Staten Island paid $3500 for $5 million in coverage in 1984. In January 1985 the policy cost $17,500. In July 1985 the policy was cancelled. Another carrier offered coverage for $72,000 in annual premiums.

—An auto parts and towing company in Walton, Ohio was charged $20,000 in 1986 for coverage which cost $11,000 in 1985.

—An insurance agent in Boundbrook, New Jersey received notice from two companies that they were no longer accepting any applications for commercial liability insurance. Also, these companies were reviewing all renewals for possible termination.

NFIB believes there must be a comprehensive solution to the insurance liability crisis. We believe that there are three causes which have contributed to the problems facing us today:

(1) An out-of-control tort system;

(2) Poor insurance industry business practices;

(3) A patchwork quilt of haphazard state regulations.

Recognizing multiple causes of the problem requires us to look at multiple solutions. It would be irresponsible to attack one problem area, resolve it, then walk away from this issue thinking it is solved. There must be a comprehensive approach and solution.

Furthermore, NFIB members do not want to single out one individual, group, or institution to blame for the crisis. They only want it resolved so they may go about their business—the business of small business, generating new wealth and creating virtually all the new jobs in this nation.

NFIB members believe an appropriate approach should include a national uniform product liability law, comprehensive tort reform, and pro-competitive changes made in the current structure of the insurance industry. It is not the intention of NFIB to "bash" insurance companies, lawyers, or state regulators in attempting to jawbone the price of insurance down and to expand its coverage. It is and will be our aim to work for those fundamental changes which will bring about better coverage at a lower price.

NFIB MANDATES

As you probably know, The National Federation of Independent Business is a lobbying group which bases its policy on the views of its membership. Issue positions percolate up from grassroots, rather than being imposed on the more than 500,000 members from our President or the Board of Directors. NFIB is very proud of its decision-making process, most especially because we keep in close touch the issues important to the membership.

NFIB hears from the membership by a combination of surveys, meetings, daily contact by our field force, and through the use of the Mandate. The Mandate is a bimonthly poll sent to all members to solicit their views on issue. Members are asked to take a position on an issue based upon their own beliefs and experiences. They are provided with an objective background summary on the issue. The members complete the Mandate and send it back to NFIB. The results are tallied and used for work on Capitol Hill. All of you receive a summary of the Mandates from NFIB so you, too, know what your small business constituents are thinking. Using the Mandate is how NFIB has developed its position on insurance. The following positions represent the basic views of NFIB members on liability insurance reform:

Membership mandate vote

	Percent
Comprehensive tort reform (return to a fault-based standard, elimination of joint and several liability:	
Favor	81
Oppose	10
Undecided	9
Uniform national product liability law:	
Favor	65
Oppose	27

Undecided	8
An expedited claims process:	
Favor	65
Oppose	23
Undecided	14
Federal minimum standards for insurance companies to follow:	
Favor	26
Oppose	67
Undecided	7
Elimination of the antitrust exemption provided in the McCarran-Ferguson Act:	
Favor	60
Oppose	26
Undecided	14

THE CAUSE OF THE CRISIS

There is, as you know, wide disagreement on the circumstances which led to the current crisis. The main dispute is between the insurance industry and the trial lawyers. The insurance industry lays most of the blame for the situation on the attorneys and the civil justice system. They claim that excessive litigation, overly generous court awards, and greedy attorneys have strained insurance reserves and thus raised the costs of underwriting. While admitting that they underpriced insurance to gain investment capital when interest rates were high, they maintain that tort reform is the answer to the problem.

The attorneys accuse the insurance companies, disclaiming the notion that Americans have become more litigious and that attorneys do little to discourage frivolous lawsuits. They contend that most of the problems are due to poor management of investments made by the insurance companies, and they point to the companies' strong performance in the stock market as evidence of the healthy financial status of the industry as a whole.

Still one other group must be mentioned. State regulators—the insurance commissioners—have done little fingerpointing except at erroneous predictions regarding interest rates, upon which they made many decisions. Although they must operate within statutory limits, they all have authority to review rates either before or after implementation. However, like state tort law, the theory and practice of insurance regulation varies widely from state to state.

We see some truth to all sides' arguments.

TORT REFORM

There are a number of reasons to support comprehensive tort reform. First, there is no question that the operation of our civil justice system is being undermined by excesses. Million-dollar awards are becoming more commonplace. Court caseloads are growing by leaps and bounds. Tort reform is needed to address these problems.

Second, these excesses translate into costs and uncertainty for insurers. Controlling awards and contingency fees and limiting liability will help control insurers' costs and help them determine risk, consequently reducing premiums and improving insurance availability.

A third reason to support legislation is to keep U.S. companies competitive in the world marketplace. Domestic companies that move offshore to avoid high costs of insurance reduce the number of manufacturers among which to spread risk in this country and thereby cause insurance rates to increase. It is a Catch-22.

Finally, tort reform has been thoroughly studied, and there is relatively widespread familiarity with the concepts involved.

NFIB is a charter member of the American Tort Reform Association (ATRA), a coalition of business groups in favor of tort reform. NFIB membership supports tort reform at both the state and federal levels. In addition to the Mandate polls noted above, in twenty-four states NFIB state directors have polled member opinions on various reforms of state tort law, and those results have likewise indicated their support. We support the following reforms, which many of the state legislatures have either passed or are considering:

1. Return to a fault-based standard for determining liability,
2. Abolish joint and several liability,
3. Modify pure comparative negligence standards,
4. Cap awards for noneconomic damages,
5. Limit contingency fees,
6. Implement alternative dispute resolution (ADR) mechanisms,

7. Penalize parties that engage in frivolous litigation,
8. Require judges/juries to itemize elements of awards,
9. Require judges/juries to consider collateral sources of compensation in determining awards,
10. Eliminate "ad damnus" clauses,
11. Allow payments of awards in installments.

Major tort reform legislation has been introduced in both the House and Senate. As you know, in the Senate, Senators McConnell, Kasten and Danforth have introduced bills addressing the need for tort reform. Senator McConnell's bill, S. 554, offers comprehensive tort reform, encompassing more than just the product liability area. The Danforth and Kasten bills, S. 666, S. 687, and S. 688, focus specifically on product liability and offer substantial reforms in this area. Also the Administration has proposed tort reforms, introduced as S. 711 in the Senate and in the House as a part of their competitiveness package, H.R. 1155.

In the House, Congressman Bill Richardson of New Mexico has introduced H.R. 1115, a comprehensive product liability reform bill. While the bill does not include all reforms we might like to see, it is a good start down the road toward improving our civil justice system with regard to product liability cases. H.R. 1115 has engendered widespread support from the business community.

These bills include the types of reform NFIB supports. Only one provision contained in some tort reform proposals gives NFIB members concern and has split the business community. That provision is the elimination of the employer's right of subrogation. NFIB members voted 72% in favor of subrogation. Currently most states allow an employer to recover from the maufacturer the cost of workers' compensation payments made to an employee who wins a product liability suit. Federal preemption of state law in this regard is not pure tort reform and should not be part of a tort reform package.

INSURANCE INDUSTRY REFORM

Has the market failed? That is the fundamental question many are asking today about the insurance market, because its answer has profound public policy implications. The industry itself has blamed the soaring premiums and reductions in coverage on previous cut-throat competition, i.e. too much competition among those in the industry. Other experts have argued that there exists a business cycle for insurance; we are currently emerging from the "bust" of the cycle, with better times to follow. There are others who believe the market has failed and offer the solution of increased federal regulation. No consensus has emerged to answer this question.

NFIB believes the market process itself has not failed. We view the current, complex insurance environment as one in which competition within the market has been hindered.

Our membership is generally concerned about the exercise of discretion by insurance companies in cancelling or not renewing policies. Notification periods are often short, and little if any explanation is given to the policyholder. Claims history seems to have no bearing on an insurer's decision to cancel our not renew. Industrywide cancellations leave insurance agents hard pressed to obtain coverage for clients, and small business owners have neither the time nor the expertise to seek out coverage for themselves. These are problems which insurance companies must come to grips with and solve. Not resolving these problems will increase the demand for more federal regulation of the industry.

One particular example of current law which hinders effective competition is the antitrust exemption contained within the McCarran-Ferguson Act. NFIB believes that the exemption contained within the law distorts competion in the insurance industry by its very existence.

The repeal of the antitrust exemptions contained within the McCarran-Ferguson Act makes sense for two reasons in today's environment. First and foremost, there is no market-based reason why there should be an antitrust exemption. Because there is no market-based justification, continuing the exemption is unfair and represents intrusion into the free economy by the federal government. Our antitrust laws were instituted to set the parameters for competition. Exemption from these laws represents a special interest granted to a specific industry. NFIB members want to see a level playing field for all companies, including those in the business of insurance. They believe the antitrust exemption hinders competition.

Second, the reason for the continuation of the antitrust exemption, passed by Congress to ward off a court-inspired regulatory crisis, no longer makes judicial sense. We need to simply accept that the business of insurance is, in fact, interstate commerce and needs to be under the scope of antitrust laws.

As legislation moves through the Senate which would eliminate the antitrust exemption in the McCarran-Ferguson Act, Congress should continue to insist that the business of insurance be regulated by the states. State regulation of insurance must continue to be the clear intent and priority of Congress. Furthermore, there may need to be some legislative language added to any proposed bill which makes clear the understanding that joint historical data collection is important for small and mid-sized insurance companies; this would be one more assurance that pro-competitive activities would continue.

I would like to emphasize that while NFIB supports the elimination of the antitrust exemption contained within the McCarran-Ferguson Act, NFIB membership does not support the "federalization" of insurance regulation or the establishment of a new agency or department to oversee the insurance industry.

There is a limited role for the federal government to play in this issue: analysis. NFIB has been encouraged by the recent statements of Federal Trade Commission Chairman Dan Oliver, who has said he would like to investigate the business of insurance. NFIB believes Chairman Oliver parallels many of our concerns and would pursue a policy to increase competition so insurance coverage will be more affordable and allow for greater coverage.

CONCLUSION

The liability insurance crisis has not gone away. The more than 500,000 members of NFIB look to you, our legislative branch, for assistance in resolving the problems which contributed to the crisis we are currently going through and, equally important, taking the necessary steps to ward off another crisis in the future.

Small businesses, many of which are marginal firms to begin with, have felt the severe impact of the liability crisis. Quite a number of businesses could simply no longer afford coverage—when coverage was available—and had to close their doors. Still other firms saw their profit margins evaporate or had to pass their skyrocketing premiums directly on to their customers in the form of higher prices. Clearly, as a result of the crisis, we experienced less job creation, less "competitiveness", and lower economic growth.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL,
Washington, DC, October 9, 1987.

Hon. ALBERT GORE, Jr.,
Senate Russell Office Building
Washington, DC.

DEAR SENATOR GORE: Thank you very much for the invitation for the Association to testify on S. 711, the product liability legislation. Regretfully, NAAG was unable to appear.

As you know, the Association has adopted two resolutions opposing federal product liability legislation which would preempt state laws and diminish consumer rights. Attached are copies of those resolutions. I respectfully request that these be made part of the public record on S. 711.

Please call on me if I can be of any assistance to you or your staff. With best personal regards, and

Sincerely,

LYNNE ROSS,
Deputy Director and Legislative Director.

Enclosure [1]

---

[1] The enclosures were not reproducible.

EAGLE MANUFACTURING CO.
Wellsburg, West Virginia 26070

"SOMEBODY MUST PAY"

Eagle Manufacturing Company, founded in 1894 and located in Wellsburg, West Virginia, is a manufacturer and supplier of gasoline, oil and kerosene containers and cans which are ultimately sold in most, if not all of the 50 states. We are consequently confronted with the diverse product liability statutes, statutes of limitations, procedural provisions and case law in each of those states. It's ironic that Eagle, located in West Virginia - which, apparently has not adopted Section 402 (A) of the Restatement (Second) of Torts - is subject to that section and the varying interpretations placed on it by the courts of most other states.

The rapidly-changing litigation climate resulting from recent product-liability case law in the United States has led to a severe imbalance between perceived rights of injured parties and defenses available to defendants - the latter in many cases having only a very tenuous connection with circumstances of injury. Manufacturers of consumer products are consequently having demanded of them, in the courts of the several states, differing and unrealistic levels of clairvoyance and technical prescience in design and labeling of their products - as a substitute for individual responsibility on the part of consumers using those products.

The insurance industry has been blamed in some quarters for the liability crisis when, in fact, this embattled industry has simply attempted to respond to market forces beyond it's control. Among these may be enumerated the recent decline in interest rates, the Bhopal event, virtually uncontrolled increase in the number and size of awards and judgments, and the emergence of such legal theories as joint and several liability and the deep pocket, not to mention mass torts and alternative liability.

Purchases of liability insurance - when they can get it - may not like the insurance industry's reaction to this crisis in terms of higher premiums - four or five times higher in some cases and for much lower limits, particularly when product liability insurance is involved - but the alternatives are few and unsatisfactory, particularly where smaller manufacturers are concerned.

Cyclical pricing practices of insurers in recent years have undoubtedly also contributed to their difficulties but it has not been a situation altogether under their control - and it is a situation that puts a particularly heavy econmic burden on smaller companies such as Eagle. In addition, the extremely high transaction costs of product liability litigation continue to be an onerous burden to defendents who, even though they may be insured, must spend a great deal of time, effort and money in absolutely non-productive ways that are, of necessity, ultimately passed on to the consumer in the form of higher prices --- or absorbed as lower profits.

The idea that "Somebody Must Pay" for every injury - that the injured must be in every instance compensated - and that some one must be found to provide that compensation - raises a question of the fundamental fairness of the tort

system as it is now construed. It is abundantly evident that liability is no longer based on fault, so fundamental changes to product liability law - at the Federal level - appear to be essential. Bills currently in committee in both the Senate (S.666) and House (H.R.1115) contain provisions that would do much to bring uniformity and balance back to tort litigation.

Specifics of such reform legislation and key issues of virtually all position papers on product liability eminating from the business community have several points in common. These include, among others:

1) Abolition of joint and several liability in most instances.
2) Elimination of the collateral source rule.
3) Establishment of uniform statutes of limitation and repose.
4) Incorporation of fault-based and state-of-the-art defenses.
5) Eliminaton or capping of punitive damages.
6) Limiting plaintiff's attorneys contingent fees.

The experience of Eagle, a small business with 180 employees, is seen as typical of the manufacturer who places consumer products in the stream of commerce, confronts products liability litigation and is hit with seven-fold increase in liability insurance premiums in just four short years. Exhibit I (attached) tabulates the premium increases and policy limit changes the Company has encountered since 1972. It may be noted that liability insurance costs today for Eagle are one hundred times more than they were fifteen years ago.

Obviously, a continuation of this trend, which is already a crisis for Eagle, would clearly threaten the Company's survival.

John J. Paull
President
September 24, 1987

EXHIBIT I

TABULATION OF LIABILITY INSURANCE COSTS
FOR EAGLE MANUFACTURING COMPANY

YEAR	PREMIUMS	GENERAL LIABILITY LIMITS	UMBRELLA
1972	$ 4,006	$ 500,000	1,000,000
1973	6,230	500,000	2,000,000
1974	9,541	500,000	2,000,000
1975	12,237	500,000	2,000,000
1976	19,788	500,000	2,000,000
1977	36,070	500,000	2,000,000
1978	59,133	500,000	2,000,000
1979	49,593	500,000	2,000,000
1980	49,769	500,000	2,000,000
1981	72,440	500,000	8,000,000
1982	65,654	1,000,000	15,000,000
1983	63,388	1,000,000	15,000,000
1984	253,254	1,000,000	15,000,000
1985	410,000	1,000,000	1,000,000
1986	485,241	1,000,000	1,000,000

○